Supreme Court, U.S.
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NO. 85-387

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WILLIAM R. MAINES

AND

PETER K. GUTHRIE,

Petitioners

CORRECTED COPY

v.

SECRETARY OF STATE,

Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME JUDICIAL COURT OF THE

STATE OF MAINE

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QUESTION PRESENTED FOR REVIEW

1) Were Petitioners deprived of due process of law under the Fourteenth Amendment to the United States Constitution by the State of Maine Superme Judicial Court's giving *res judicata* effect to a state administrative, pre-hearing driver's license suspension, thus barring Petitioner's §1983 Complaint for Declaratory and Injunctive Relief which challenged the constitutionality of the statute under which the suspension took place.

PARTIES

The names of all parties to this proceeding are contained in the caption of the case.

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JURISDICTION

(i) The date of the Maine Supreme Judicial Court judgment sought to be reviewed is May 17, 1985. It was entered on the same date.

(ii) The date of the Maine Supreme Judicial Court's Order respecting Petitioner's Motion for Reconsideration is June 7, 1985. It was entered on the

same date and can be found herein at the end of Appendix A, p. 21 et seq.

(iii) The jurisdiction of this Court to review the judgment in question by writ of certiorari is invoked pursuant to 28 U.S.C. §1257(3) which states, in pertinent part,

> ".... where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. UNITED STATES CONSTITUTION, AMENDMENT XIV

§1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

jurisdiction the equal protection of its laws.

B. Maine Administrative Procedure Act 5 M.R.S.A. §8002(1) (1979)

§8002. Definitions.

As used in this Act, unless the context otherwise indicates, the following words and phrases shall have the following meanings.

1. Adjudicatory proceeding. "Adjudicatory proceeding" means any proceeding before an agency in which the legal rights, duties or privileges of specific persons are required by constitutional law or statute to be determined after an opportunity for hearing.

C. 5 M.R.S.A. §8002(5) (1979)

. . . .

5. Final Agency Action. "Final Agency Action" means a decision by an agency which affects the legal rights, duties or privileges of specific persons, which is dispositive of all issues, legal and factual, and for which no further recourse, appeal or review is provided within the agency.

D. 5 M.R.S.A. §8003 (1979)

§8003. Inconsistent provisions

Except where expressly authorized by statute, any statutory provision now existing or hereafter adopted which is inconsistent with the express provisions of the Maine Administrative Procedure Act

shall yield and the applicable provisions of this Act shall govern in its stead.

E. 5 M.R.S.A. §9051 (1979 & 1984 Supp.)

SUBCHAPTER IV

ADJUDICATORY PROCEEDINGS

§9051. Scope

1. Adjudicatory proceeding.

In any adjudicatory proceedings, except those proceedings involving correctional facilities, the Workers' Compensation Commission or the State Parole Board, the procedures of this subchapter shall apply.

2. Hearing

Unless a hearing is required by statute, the requirements of this subchapter, except the notice provisions

of section 9052, subsection 1, shall not apply until a request for a hearing is made under section 9052, subsection 1, paragraph A, or a hearing is set by the agency.

F. 5 M.R.S.A. §9053(3) (1979)

§9053. Disposition without full hearing

Unless otherwise provided by law, agencies may:

. . . .

3. Default. Make informal disposition of any adjudicatory proceeding by default, provided that notice has been given that failure to take required action may result in default, and further provided that any

such default may be set aside by the agency for good cause shown;

G. 5 M.R.S.A. §10003(1) (1979)

SUBCHAPTER V

LICENSING

§10003. Right to Hearing

1. Opportunity for hearing

Subject to the provisions of section 10004, an agency shall not amend or modify any license unless it has afforded the licensee an opportunity for hearing in conformity with subchapter IV, nor shall it refuse to renew any license unless it has afforded the licensee either an opportunity for an agency hearing in conformity with subchapter IV or an opportunity for a hearing in the Administrative Court. In any such

proceeding deemed by the agency to involve a substantial public interest an opportunity for public comment and participation shall also be given by public notice in conformity with subchapter IV.

. . . .

H. 5 M.R.S.A. §10004(3) (1979)

§10004. Action without hearing

Notwithstanding the provisions of sections 10003 and 10051, an agency may revoke, suspend or refuse to renew any license without proceedings in conformity with subchapters IV or VI, when:

. . . .

3. Health or safety hazard.

The health or physical safety of a person or the continued well-being of a significant natural resource is in immediate jeopardy at the time of the agency's action, and acting in accordance with subchapter IV or VI would fail to adequately respond to a known risk, provided that the revocation, suspension or refusal to renew shall not continue for more than 30 days;

I. 29 M.R.S.A. §2241(3) (Supp. 1984)

§2241. Suspension or revocation of license, registration or fuel use decal

. . . .

3. Hearing. Upon suspending or revoking a motor vehicle license, permit or privilege to operate, registration or

certificate of title of any person without preliminary hearing, the Secretary of State shall notify that person as provided in Title 5, section 9052, subsection 1, that an opportunity for hearing shall be provided without undue delay, after receipt of a request, except where the suspension rests solely upon a conviction in court of any offense which by statute is expressly made grounds for that suspension or revocation.

. . . .

J. 29 M.R.S.A. §2241-G (1983)

The text of this statute is set forth in Appendix D.

STATEMENT OF THE CASE

On June 23, 1983, P.L.1983, c.478, "An Act to Deter Drinking and Driving by Teenagers" ("Teen Drinking Act") became the law of the State of Maine by virtue of its approval by the Governor with an emergency preamble.1

The "Teen Drinking Act" gave the Secretary of State new authority to suspend for one year, without preliminary hearing, the motor vehicle driver's license of any person under twenty years of age

> "... upon receipt of both a written statement under oath from a law enforcement officer that the officer had probable cause to believe that a person was operating or attempting to operate a motor vehicle while having 0.02% or more by weight

1 Amending 29 M.R.S.A. §2241-G.

> of alcohol in his blood and the result of a blood-alcohol test taken under this section which shows the presence of 0.02% or more by weight of alcohol in his blood ..." 29 M.R.S.A. §2241-G(2)(B).2

A hearing, if requested, could be had without "undue" delay but there could be no stay of the suspension pending the hearing.3

On or about July 30, 1983, Peter K. Guthrie received notification from the Secretary of State advising him that his license to operate a motor vehicle was suspended effective August 12, 1983 for

---

2 The age limit has since been raised to 21. P.L.1985, c.402, effective June 21, 1985.

3 29 M.R.S.A. §2241(3) (Supp. 1984). P.L. 1983, c.850, Section 4, effective May 2, 1984, repealed most of P.L.1983, c.478 and re-enacted it with substantial modifications, e.g., a timely request for an administrative hearing stays the suspension pending the hearing. 29 M.R.S.A. §2241-G(2)(G)(1).

at least a one year period because of a report that he had violated 29 M.R.S.A. §2241-G(2)(B) by operating a motor vehicle with .02% or more by weight of alcohol in his blood. The suspension was supported by a chemist's certificate that Guthrie had .02% by weight of alcohol in his blood on July 19, 1983, as measured by a breath test.

On or about August 17, 1983, William R. Maines received notification from the Secretary of State advising him that his license to operate a motor vehicle was suspended effective August 30, 1983 for at least a one year period because of a report that he had violated 29 M.R.S.A. §2241-G(2)(B) by operating a motor vehicle with .02% or more by weight in his blood. The suspension was supported by a chemist's certificate that he had

.04% by weight of alcohol in his blood on July 29, 1983, as measured by a breath test.

Neither Petitioner experienced any impairment of his ability to drive on the date his breath test was taken nor did the police arrest either one for impaired driving.4 Neither requested a hearing on the suspension before the Secretary of State pursuant to 29 M.R.S.A. §2241-G(2)(B).

The only issue at such a hearing would have been whether "there was probable cause to believe that the person was operating or attempting to operate a motor vehicle while having 0.02% or more by weight of alcohol in his blood," i.e.,

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4 See Affidavits of Petitioners in Appendix D, pp.1-7.

whether the police officer stopping the under-20 driver had sufficient probable

cause to justify the stop. 29 M.R.S.A. §2241-G(2)(B).5

5 P.L.1983, c.850, supra, eliminated this restriction of issues and provided instead at 29 M.R.S.A. §2241-G(2)(K)(2):

K. The hearing and notice shall be as follows.

. . . .

(2) The scope of the hearing shall include whether, by a preponderance of the evidence:

(a) There was probable cause to believe that the person had not attained his 20th birthday and that the person was operating or attempting to operate a motor vehicle while having 0.02% or more by weight of alcohol in his blood;

(b) The person operated or attempted to operate a motor vehicle;

(c) At such time the person had 0.02% or more by weight of alcohol in his blood; and

(d) At such time the person had not attained his 20th birthday.

The age limits were increased to 21 by virtue of P.L.1985, c.402.

Prior to the enactment of c.850, the Kennebec County Superior Court had invalidated this restriction of issues on constitutional grounds in Williamson vs. Secretary of State, Doc. No. CV-83-544, February 28, 1984. The text of this decision appears herein at Appendix B, pp. 34 et seq.

The number of persons whose licenses have been suspended by the Secretary of State under 29 M.R.S.A. §2241-G currently approximates 4000.[6]

On October 6, 1983, Petitioners filed a Verified Class Action Complaint for Declaratory and Injunctive Relief in the Kennebec County Superior Court, pursuant to 42 U.S.C. §1983. The Complaint prayed for a declaration that P.L.1983, c.478 contravened the due process, equal protection and bill of attainder clauses of the Maine and United States Constitutions. Petitioners further sought an order enjoining the Secretary of State to cease and desist

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6 Respondent admitted Petitioner's Request for Admission 1(U), by Answers dated January 9, 1984, which Request stated, "The Secretary of State ... continues to ... suspend licenses at the rate of approximately 5 licenses per day."

from enforcing P.L.1983, c.478, to purge the records of all suspensions imposed pursuant to P.L.1983, c.478 and to restore all license certificates and rights to operate motor vehicles, without reinstatement fee, which had been suspended pursuant to P.L.1983, c.478. Petitioners also sought an award of costs including reasonable attorneys' fees, pursuant to 42 U.S.C. §1988.

On November 3, 1983, Respondent filed a Motion to Dismiss. On November 17, 1983 Petitioners filed an Amended Verified Class Action Complaint seeking, in addition to the relief sought in the original Complaint, a declaration that the pre-hearing suspensions under P.L.1983, c.478 were void or lapsed after 30 days.

After hearing, the Superior Court granted the Respondent's Motion to Dismiss, treated as a Motion for Summary Judgment, on the grounds that "Plaintiffs' failure to seek administrative and judicial review of the Secretary of State's decision to suspend their licenses effectively resulted in a final judgment of the Secretary of State which must be recognized by this Court as a bar to collateral litigation of any issue which was or could have been litigated initially."7

Petitioners filed a timely appeal to the Maine Supreme Judicial Court, sitting as the Law Court. The Law Court affirmed the summary judgment of the Superior Court, agreeing that Petitioner's §1983

7 Appendix B at pp. 21-22.

action was barred by the doctrine of res judicata.8

RAISING OF FEDERAL ISSUES

Materials required by Rule 21.1(h) are set forth in Appendix E.

8 The decision of the Law Court dated May 17, 1984 is found at Appendix A. Its June 7, 1985 Order upon Petitioner's Motion for Reconsideration is found at Appendix A, pp. 21-22.

REASONS FOR GRANTING THE WRIT

This case presents the Court with the opportunity of deciding the previously unsettled question whether State claim preclusion law, as applied to the decision of a state administrative agency, must minimally conform to the due process standards applicable in the federal system.

Secondarily, the Court may correct the Maine Supreme Judicial Court's palpable misapplication of the doctrine of res judicata to the driver's license suspensions imposed upon Petitioners by the Maine Secretary of State pursuant to 29 M.R.S.A. §2241-G.

As elucidated by this Court in the seminal opinion of United States v. Utah

Construction & Mining Co., 384 U.S. 394, 422 (1966), res judicata principles are grounded in due process considerations which should apply to the states through the 14th Amendment:

> "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." (Citations omitted). (Emphasis supplied).

These criteria are also now found in §83 of the Restatement of Judgments (Second) (1982), upon which authority the Law Court purported to rely in affirming

the Superior Court's granting of summary judgment to Respondent.9

Although the Law Court cited the Restatement, it completely ignored the black-letter principle therein endorsed that res judicata can only be applied to the adjudication of an administrative agency where the parties have been accorded a full and fair opportunity to litigate the case.

---

9 §83 states, in pertinent part,

. . . .

(2) An adjudicative determination by an administrative tribunal is conclusive under the rules of res judicata only insofar as the proceeding resulting in the determination entailed the essential elements of adjudication, including:

. . . .

(b) The right on behalf of a party to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut evidence and argument by opposing parties;

. . . .

Instead of analyzing Maine's "Teen Drinking Act" to determine whether it provided such an opportunity at hearings before the Secretary of State available to Petitioners in 1983, the Law Court rather cryptically skirted the issue by stating:

> "Even on appeal the plaintiffs have not suggested any prejudice resulting to them from perceived limitations upon a hearing they did not request."

Even a cursory examination of Appendix E herein clearly shows that Petitioners have consistently argued throughout this litigation that the Teen Drinking Act's former restriction of issues at the administrative hearing denied them due process of law. Therefore, the Law Court's above-quoted statement is demonstrably tenuous.

However, the thrust of the Law Court's statement seems to be that Petitioners lack standing to challenge the inadequate hearing opportunity accorded them because they did not participate in an unconstitutional exhibition. No logical reason presents itself for compelling such a futile act. Cf., Churchill v. S.A.D. No. 49 Teachers Association, 380 A.2d 186, 190 (Me. 1977) (where resort to administrative agency would be futile, exhaustion of remedy not required).

The Maine Supreme Judicial Court's holding in this case squarely conflicts with numerous precedents of this Court which have defined the meaning of the phrase, "full, fair and adequate hearing." In fact, legal research does not reveal another instance in which a

court has so applied the doctrine of res judicata without at least an implicit finding of the adequacy of the administrative opportunity for hearing. See, e.g., Zanghi vs. Incorporated Village of Old Brookville, 752 F.2d 42, 46 (2nd Cir. 1985).

Without repeating verbatim Justice Alexander's thorough, and unappealed, Superior Court opinion in Williamson v. Secretary of State, supra, finding unconstitutional the restriction of issues at the administrative hearing, the following is a summary of the pertinent cases:

(A) Barry v. Barchi, 443 U.S. 55 (1979) - due process infringed by the suspension of a harness racing trainer's license where the state statute failed to

specify a time within which a hearing would be held once requested and because there was no provision for a stay of the suspension pending the hearing.

(B) Mackey v. Montrym, 443 U.S. 1 (1979) - due process satisfied by a driver's license suspension imposed without preliminary hearing due to a refusal to take a blood-alcohol test, since such suspensions bear a rational relationship to the government's legitimate interest in highway safety.

(C) Bell v. Burson, 402 U.S. 525 (1971) - procedural due process required a determination whether there was a reasonable possibility of a judgment being rendered against the licensee before the state could suspend the license based upon the driver's fault.

In the instant case, the opportunity for hearing accorded by the Teen Drinking Act failed the tests established by the above decisions of this Court in several respects:

(A) Under Barry v. Barchi, no specific time was set following the pre-hearing suspension within which a hearing could be had upon request. Rather, pursuant to 29 M.R.S.A. §2241(3), such a hearing would be given "without undue delay." Moreover, no stay of the suspension pending hearing was allowed.10

(B) Under Mackey v. Montrym, there is no legitimate state interest in

10 Currently, 29 M.R.S.A. §2241-G(2)(G)(1) (Supp. 1984) requires a hearing and decision within 30 days after a request for hearing is received and provides for a stay of the suspension pending hearing.

allowing a pre-hearing suspension because the threshold level of .02% w/v alcohol in the blood bears no scientific correlation with the driving ability of a person under 20 years of age.11

(C) Under Bell v. Burson, the Secretary of State in 1983 was not required to determine for himself at any point in the suspension process the reasonable possibility that Petitioners had in fact operated a motor vehicle with a blood-alcohol level of .02% w/v or more. The hearing officer was only

11 Now 21 years of age pursuant to P.L. 1985, c.402. For purposes of summary judgment on this issue, weight should have been accorded to Respondent's Admission that the Maine Department of Public Safety does not even compile statistics on accidents where the blood-alcohol level was below .05%. Answer 1(T), Answers to Request for Admissions, dated January 9, 1984. Since no factual evidence was presented by Respondent on this issue, the award of Summary Judgment was improper. Rule 56, M.R.C.P.

required to confirm that there was probable cause, at the time when the driver was stopped by the police, to believe that the person was so operating a vehicle; thereby justifying the stop.12 This restriction of issues at the administrative hearing effectively prevented the presentation of any evidence on the factual issues of vehicle operation and blood-alcohol level. Only the existence of the officer's probable cause could be contested.

An example can highlight the problem. The police officer's determination of probable cause occurs at

12 29 M.R.S.A. §2241-G(2)(K)(2) (Supp. 1984), as amended by P.L. 1985, c.402, currently requires not only the finding that there was such probable cause, but also that the person under 21 years of age had in fact operated a motor vehicle with a blood-alcohol level of .02% or more.

a point in time prior to the chemist's blood-alcohol testing. The blood-alcohol test, however, showing a level of .02% or more, is a pre-requisite to suspension. 29 M.R.S.A. §2241-G(2)(B)(2). Yet the Teen Drinking Act formerly allowed a challenge at the administrative hearing only to the officer's probable cause, not to the blood-alcohol test.

CONCLUSION

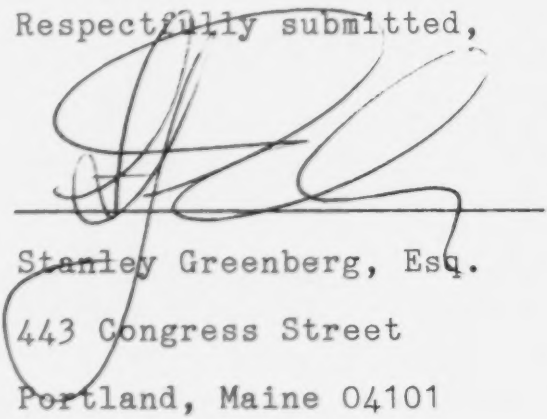
This Court should exercise its discretion in this case in favor of granting Petitioners a Writ of Certiorari. The due process underpinnings of Utah Construction require that its rationale be extended to the states under the 14th Amendment. The legal foundation and reasoning of the Maine Supreme Judicial Court diverges widely from this Court's precedents and settled principles of res judicata.

Petitioners, and the class they purport to represent, have needlessly been barred from pursuing their constitutional claims on the basis of an administrative hearing process which demonstrably lacked adequate procedural safeguards.

In the words of Justice Alexander in Williamson vs. Secretary of State, "It is not a particularly close question."

Date: September 5, 1985

Respectfully submitted,



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APPENDIX A

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions
Decision No. 3817
Law Docket No. Ken-84-24

WILLIAM R. MAINES, et al.

v.

SECRETARY OF STATE

Argued June 7, 1984
Decided May 17, 1985

Before McKUSICK, C.J., NICHOLS, ROBERTS, WATHEN, GLASSMAN, and SCOLNIK, JJ.

ROBERTS, J.

William Maines and Peter Guthrie appeal from the Superior Court's denial of their motion for class certification and entry of summary judgment on the ground of res judicata in favor of the defendant Secretary of State ("the State"). The plaintiffs' drivers'

licenses were suspended by the State as of August 12 and August 30, 1983, respectively, for violation of 29 M.R.S.A. §2241-G(2)(B) (Supp. 1984), promulgated as part of an act to deter teenage drinking and driving. Neither Guthrie nor Maines requested a post-suspension administrative hearing nor sought direct review in Superior Court pursuant to 29 M.R.S.A. §2242 (Supp. 1984). Instead, on October 6, 1983, they filed this class action in Superior Court asserting the facial unconstitutionality of the act and seeking declaratory and injunctive relief. Because we agree that this action is barred by applicable principles of res judicata, we affirm the summary judgment.

Section 2241-G prohibits operation of a motor vehicle by a person less than

20 years old with .02% or more by weight of alcohol in his blood and provides for suspension of that person's license upon receipt of a law enforcement officer's report of a violation. The statute also provides for a post-suspension hearing if requested in writing within 10 days of receipt of the suspension notification. After such a hearing, a party may appeal to the Superior Court within 30 days pursuant to 29 M.R.S.A. §2242 (Supp. 1984) for review of the administrative decision.

On July 30, 1983, Guthrie was notified by the State that his license would be suspended as of August 12 based on a report that he had operated a motor vehicle on July 19, 1983, with .02% by weight of alcohol in his blood. On August 17, Maines was notified that his

license would be suspended as of August 30 for a similar violation allegedly committed on July 29, 1983. Both suspensions were for one year. Both notices informed the recipients of their right to an administrative hearing and of the 10 day deadline for requesting the hearing.

On October 6, 1983, Maines and Guthrie filed this class action complaint, asserting, inter alia, the facial unconstitutionality of the statute. They alleged that the act denied them due process and equal protection of the law and constituted a bill of attainder under the federal and Maine constitutions. In response to the State's motion to dismiss, the Superior Court found the constitutional claim barred by the doctrine of res judicata.

The court entered summary judgment for the State. The court also denied the plaintiffs' motion for class certification.

The case at bar involves no factual dispute. The only issue presented is a facial challenge to the constitutionality of the statute. There was no determination, nor could there have been any determination, of a factual issue by the agency that would affect the issue raised in this action. Where the facial constitutionality of the statute underlying the agency action is in issue, there is no need for agency fact finding. Town of Windham v. LaPointe, 308 A.2d 286 (Me. 1973). the plaintiffs, relying on Fisher v. Dame, 433 A.2d 366 (Me. 1981), argue that their departure from the route of direct judicial review is justified

> where claim is made that the ordinance under which the administrative agency purported to act was unconstitutional on its face, a contention which, if established, would render the administrative action beyond lawful authority . . . .

433 A.2d at 374.

The State contends that the instant case is controlled by Small v. Gartley, 363 A.2d 724 (Me. 1976), and Piacitelli v. Quinn, 449 A.2d 1126 (Me. 1982). In both cases, as in the instant case, administrative adjudication has been commenced against the plaintiffs, and in both of those cases we held that the plaintiffs could not ignore the statutorily imposed appeal procedures even though their collateral challenges raised the constitutionality of the operative statute. In Small the plaintiff's driver's license was suspended as the result of three OUI

convictions. He brought an action challenging the constitutionality of the statute authorizing suspension long after the time limitation for direct administrative and judicial review of the suspension had run. We said:

> [I]f a public agency exceeds its statutory powers or, even in matters over which it has jurisdiction, proceeds in a manner unauthorized by law, its orders, decrees and judgments may be attacked collaterally as null and void, but, if within the periphery delimited by the legislative power grant, such orders, decrees and judgments, when unreversed or unmodified in the manner provided by the pertinent legislation, have the effect of final judgments, and they cannot be attached before a judicial forum other than that expressly set up by the Legislature, for some alleged error of law, even of constitutional dimension, which might have been corrected on proper application to the court of last resort provided under the statute.

Small, 363 A.2d at 729 (emphasis in original).

In Piacitelli we followed our decision in Small. In Piacitelli we held that the plaintiff, who had not pursued his statutorily provided right to direct review, could not collaterally attack the constitutionality of the suspension of his driver's license. Piacitelli, however, was based in part on our earlier holding in State v. Higgins, 338 A.2d 159, 161 (Me. 1975), in which we held that a person whose license had been suspended could not challenge that suspension through the self-help measure of driving while under suspension. Piacitelli involved a criminal action brought by the State against Piacitelli and also a civil action brought by Piacitelli attacking the validity of the suspension of his license. We rejected Piacitelli's constitutional claim in the

criminal case on the Higgins rationale. However, our affirmance of the dismissal of Piacitelli's civil action was based on Small, 449 A.2d at 1128.

We now recognize that much of the language in our opinions concerning these issues is based on the historical underpinnings of equitable relief. The merger of law and equity, coupled with improved administrative procedures and our modern civil rules, now allows us to analyze this case under conventional res judicata concepts.

The concept allowing collateral attack of void decisions, see Small 449 A.2d 729, developed when administrative determinations were not judicially reviewable by "appeal." Judicial review was facilitated by using extraordinary

writs such as prohibition, mandamus, certiorari, and injunction. These writs were held not to reach "mere error," but only instances of administrative action "in excess of jurisdiction," thereby implying that the agency action was null and void. Today, "mere error" justifies timely review, and perhaps reversal, but in the absence of such review, the administrative determination is not subject to subsequent attack.

The processes used in our administrative agencies are now substantially similar to those employed by courts, and their decisions may be accorded the finality that attaches to judicial judgments. The rules of res judicata thus may be applied to agencies with respect to their own adjudications.

Furthermore, the distinction between "direct" and "collateral" attack has been blurred over the years. Distinctions between direct and collateral attack differ depending upon the context in which they are presented and thereby result in needless confusion of the basic issue whether relief from a judgment is appropriate. The merger of law and equity, coupled with the availability of M.R. Civ. P. 60(b), removes any need to resort to the obfuscatory distinction between direct and collateral attack. Except in certain situations in which the time limits in rule 60(b) preclude relief under its provisions, the rule affords a party to a judgment the full range of relief that might be obtained through an independent action.

II.

We conclude that many of the concepts carried over from the complexities of archaic procedures do not serve our present needs. We no longer find it helpful to analyze the availability of equitable relief from this type of final agency action in terms of the adequacy of legal remedies. We find no significant assistance in resort to the dichotomy of direct versus collateral attack or to the distinction between void and voidable decisions. The time has come for us to analyze the rights of the parties in terms of res judicata principles.

Section 83 of the Restatement (Second) of Judgments (1982) declares

that under appropriate conditions the res judicata principles developed in judicial proceedings are applied to adjudicative determinations by administrative tribunals. Application of the defense of res judicata is subject to the same exceptions and qualifications as in court judgments. When dealing with agency decisions governed by the procedural protections of the Maine Administrative Procedure Act (M.A.P.A.), 5 M.R.S.A. §§8001-11008 (1979 and Supp. 1984), the legitimate public interest in finality outweighs any concern for "correctness" in the process. The only exceptions are those applicable to judgments generally. In this case the plaintiffs permitted the administrative agency's adjudication of the State's right to suspend their license to become final with the resulting res judicata consequences.

The plaintiffs seek to avoid the defense of res judicata on the ground that the Secretary of State did not act in the context of an adjudicatory proceeding. Instead, they claim that the agency's action was "routine and ministerial." Their argument overlooks express provisions of the M.A.P.A. which, along with 29 M.R.S.A. §2241-G(2)(B) (Supp. 1984), permits the agency to "place on any party the responsibility of requesting a hearing." 5 M.R.S.A. §9053 (1979). Moreover, section 9053 permits the agency to make informal disposition (without hearing) of any adjudicatory proceeding by default.1

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1 A default may be set aside by the agency for good cause shown. 5 M.R.S.A. §9053(3).

The affidavits of the plaintiffs establish quite clearly that they deliberately suffered the suspensions to become final pursuant to section 2241-G(2)(D) as a result of their failure to request a hearing. The plaintiffs argue that because the Secretary of State is not required to provide an adjudicatory hearing absent a request, the proceeding herein was not adjudicatory in nature. We reject any notion that the plaintiffs could prevent entry of a final agency adjudication by their own default. Similarly, we reject the plaintiffs' claim that there were no default judgments entered because there is absent "a rule of finality." We determine that section 2241-G(2)(D) contains just that--a statutory provision that the suspension becomes final in the absence of a request

for hearing. Moreover, we find no defect in the notices mailed to the plaintiffs.

Plaintiffs argue somewhat circuitously that (1) the statutory limitation imposed upon the scope of the administrative hearing denies due process and (2) that the nature of their facial attack upon the constitutionality of the statute excuses their failure to exhaust administrative remedies. Even on appeal the plaintiffs have not suggested any prejudice resulting to them from perceived limitations upon a hearing they did not request. Contrariwise, they assert with some vigor that an administrative determination of the facts

would have no impact upon the gravamen of their complaint.2

We distinguish the application of res judicata in this case from the doctrine of exhaustion of administrative remedies. The plaintiffs' argument that the Superior Court could declare void or enjoin enforcement of a statute facially unconstitutional without the necessity of a prior administrative proceeding misses the point. We need not and we do not decide whether the plaintiffs could have raised their constitutional claim upon a complaint filed prior to the

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2 In Boston Milk Producers, Inc. v. Halperin, 446 A.2d 33, 36 (Me. 1982), we intimated that constitutional issues may be decided in an action for declaratory judgment if there is no necessity for a determination of facts by an administrative agency. We sidestepped, however, any review of procedures that could be called adjudicatory thus avoiding any res judicata problem.

administrative decision becoming final and without any administrative hearing. We simply decide that they cannot permit the administrative action to become final and then seek judicial relief in the absence of factors justifying post-judgment relief.

We reject the plaintiffs' assertion that the facial unconstitutionality of the statute effectively excused their failure to follow usual procedures. Relying upon the above-quoted dictum in Fisher v. Dame, 433 A.2d at 372 (Me. 1981), the plaintiffs suggest that the unconstitutionality of the statute renders the administrative action beyond lawful authority. That argument must depend for its validity upon the notion, formerly accepted, that "a judicial determination of unconstitutionality

nullifies the legal force of the statute from its inception." That principle has been previously rejected by this Court in State v. Higgins, 338 A.2d 159, 161-162 (Me. 1975).

In Higgins, 338 A.2d at 162, we quoted as a distillation of the modern view the suggestion from Lemon v. Kurtzman (II), 411 U.S. 192, 201 (1973), that courts will "eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots." We determine that the methodology of the Restatement offers the best means of reconciling the tension between finality of administrative action and validity of result. The plaintiffs herein have presented no basis for relief

from a final judgment. They are bound by their own deliberate choice to permit the decision of the Secretary of State to become final.

In view of our disposition on the merits of the plaintiffs' complaint, we need not discuss the claim of error in denying class certification.

The entry is:

Judgment affirmed.

All concurring.

STATE OF MAINE

KENNEBEC, SS.

SUPREME JUDICIAL COURT

Sitting as the Law Court

Docket No. Ken-84-24

WILLIAM R. MAINES et al.	
vs.	ORDER
SECRETARY OF STATE	

Upon motion of appellants for reconsideration, it is ORDERED that the second sentence on page 8 of the opinion originally reading as follows: "We determine that section 2241-G(2)(D) contains just that--a statutory provision that the suspension becomes final in the absence of a request for hearing.", shall be modified to read as follows: "We determine that section 2241-G(2)(D) now

makes explicit what was implicit in the original version of section 2241-G(2)--that the suspension becomes final in the absence of a request for hearing."

It is FURTHER ORDERED that except for the foregoing modification, the motion of appellants for reconsideration be and it hereby is denied. The mandate shall issue forthwith.

Dated: June 7, 1985.

For the Court

/s/ Vincent L. McKusick

Chief Justice

RECEIVED June 7, 1985
Supreme Judicial Court

APPENDIX B

STATE OF MAINE
KENNEBEC, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-83-467

****

WILLIAM R. MAINES, of South Portland, County of Cumberland and State of Maine,

and

PETER K. GUTHRIE, of Ellsworth, County of Hancock and State of Maine,

On Behalf of Themselves and On Behalf of All Persons Similarly Situated,

PLAINTIFFS

vs.

RODNEY S. QUINN, Secretary of the State of Maine, Augusta, County of Kennebec and State of Maine,

DEFENDANT

****

DECISION

AND

ORDER

This action is before the Court on Plaintiffs' Motion for Class Certification and Defendant's Motion to Dismiss Plaintiffs' action on the grounds that this action is barred by the doctrine of res judicata. The parties appeared before the Court for hearing on November 23, 1983.

The Plaintiffs have initiated this action pursuant to 42 U.S.C. §1983 for the purpose of challenging the constitutionality of the "teen drinking and driving law", P.L. 1983, ch. 478, as enacted by the 111th Maine Legislature on June 23, 1983. The new law requires the Secretary of State to

> suspend for a minimum period of one year, without preliminary hearing, the provisional license of any person under 20

> years of age ... [as] to whom there is received the result of a test to determine his blood-alcohol level which shows the presence of 0.02% or more by weight of alcohol in his blood. 29 M.R.S.A. §2241-G(2)(B)(2).

Although the Act does not provide for a pre-suspension hearing, it does provide that:

> If a person, whose license is so suspended, desires to have a hearing, he shall so notify the Secretary of State in writing within 10 days from the effective date of the suspension.
> Id.

Additionally,

> Any person whose provisional license is suspended under this section on the basis of a blood-alcohol test shall have the right to file a petition in the Superior Court ... to review the order of suspension by the Secretary of State by

> the same procedure as is provided in section 2242.1

Plaintiff Maines' driver's license was suspended effective August 30, 1983. The suspension was supported by a certificate that he had operated a motor vehicle with .04% by weight of alcohol in his blood on July 29, 1983. Plaintiff Guthrie's driver's license was suspended on August 12, 1983. His suspension was supported by a certificate that he had operated a motor vehicle with .02% by weight of alcohol in his blood on July 19, 1983. Although notified of their right to request a hearing neither

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1 29 M.R.S.A. §2242 (Supp. 1982-1983) provides in relevant part:

> After hearing, ... any person who is aggrieved by the decision of the Secretary of State ... may, within 30 days thereafter, appeal to the Superior Court for a judicial review as provided in Title 5, section 11001, et seq.

Plaintiff did so. This equitable action, commenced on October 6, 1983, is the only challenge Plaintiffs have made to the suspension of their driver's licenses.

PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Plaintiffs seek certification of a class comprised of all persons under twenty years of age who are, have been, or will become subject to the drivers' license suspension of chapter 478. Plaintiffs argue that their complaint satisfies all of the requirements of a class action under M.R. Civ. P. 23.

The Court finds that certification of this class is unwarranted.

Plaintiffs' compliance with M.R. Civ. P. 23 need not be fully analyzed in order to reach this conclusion. Even if Plaintiffs have satisfied all of the prerequisites to a class action as established by Rule 23(a), they have not demonstrated good cause for maintenance of a class action under Rule 23(b). Final injunctive relief with respect to the class as a whole, should such relief be granted, is not necessary to accomplish the result sought by Plaintiffs. A judicial determination of the constitutionality of the Act will clearly be binding upon the Defendant as to all potential members of the class regardless of their participation in this or any similar action.

DEFENDANT'S MOTION TO DISMISS

Defendant has moved to dismiss the Plaintiffs' action for failure to state a claim upon which relief can be granted on the grounds that it is barred by the doctrine of res judicata. Because the Court must consider matters outside the pleadings, which have been presented to the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. M.R. Civ. P. 12(b). The Court is satisfied that there is no genuine issue of material fact and that it is appropriate to determine which party is entitled to judgment as a matter of law on the issue of whether Plaintiffs' action is barred by the doctrine of res judicata.

In United States v. Utah Construction & Mining Co., 384 U.S. 394,

86 S. Ct. 1545 (1966), the United States Supreme Court set forth the criteria for application of the doctrine of res judicata to determinations of administrative agencies. In order for the doctrine to apply: (1) the agency must have been acting in a judicial capacity; (2) the agency must have rendered a decision or judgment on the factual disputes relevant to the issues properly before it, and (3) the parties must have had a full, fair, and adequate opportunity to litigate and argue their version of the facts.

Plaintiffs concede that Defendant would have been acting in a judicial capacity if their order of suspension had been issued <u>after</u> notice and opportunity for hearing, but maintain that neither notice nor opportunity for hearing were

provided in accordance with 5 M.R.S.A. §9052(1)(A) (1979), because they were not notified of their right to a hearing prior to the suspension of their licenses. Plaintiffs argue that the proceeding by which their licenses were suspended was, therefore, not adjudicatory.

The United States Supreme Court has upheld the constitutionality of prehearing suspensions in analogous circumstances. See, e.g., Mackey v. Montrym, 443 U.S. 1, 99 S.Ct. 2612 (1979) (hearing not required to precede suspension under Massachusetts Implied Consent Law). In Mackey the Supreme Court concluded that the post-suspension hearing was not unconstitutional because, pursuant to Matthews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893 (1976), the

State's interest in highway safety was superior to the licensee's interest in keeping his license, and the risk of administrative error was not substantial.

The fact that the hearing afforded by chapter 478 occurs after license suspension does not alter the fact that the proceeding by which Defendant suspended Plaintiffs' licenses was an adjudicatory proceeding and that Defendant functioned in a judicial capacity, thus satisfying the first part of the Utah Construction test.

Plaintiffs next argue that Defendant's decision to suspend their licenses is not a final judgment because Defendant failed to comply with certain provisions of the Maine Administrative Procedures Act [APA], 5 M.R.S.A. §§8001-

11116 (1979 & Supp. 1982-1983). Plaintiffs maintain that because they were not afforded an adjudicatory proceeding, pursuant to 5 M.R.S.A. §10003 (1979), their license suspensions only remained in effect for 30 days, 5 M.R.S.A. §10004(3) (1979), after which Defendant should have entered a default judgment in order to finalize the decisions to suspend their licenses. 5 M.R.S.A. §9053(3) (1979). In other words, Plaintiffs contend that there has been no "final agency action" from which an appeal could be taken pursuant to 5 M.R.S.A. §11001 (1979 & Supp. 1982-1983) because no action was taken by Defendant after the notice of opportunity for hearing was sent to Plaintiffs.

Plaintiffs' reliance upon the above referenced sections of the APA is

misplaced. Section 10003 of the APA provides that subject to the provisions of section 10004 an agency shall not amend, modify, or refuse to renew a license without affording the licensee an opportunity for hearing in conformity with subchapter IV of the APA (adjudicatory hearings).2 This Court has found, supra at 5, that Plaintiffs were afforded the right to an adjudicatory proceeding in which to contest the validity of the suspension of their licenses, albeit a post-suspension proceeding. Section 10003 therefore applies to this case. Section 10004 does not apply because it governs instances in which an individual's license is revoked,

2 Defendant's argument that section 10003 does not apply because it refers only to amendments, modification, and renewal of licenses is without merit. Defendant's suspension of Plaintiffs' licenses is indeed an amendment to or modification of their provisional licenses.

suspended or not renewed without being afforded a proceeding in the Administrative Court or without an adjudicatory proceeding by the agency. Because section 10004(3) is inapplicable Plaintiffs' contention that Defendant's suspension of their licenses was only valid for 30 days is incorrect.3

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3 Plaintiffs' argument that Defendant's suspension orders lapsed after 30 days because default judgment was not entered against Plaintiffs need not be addressed since section 10004(3) is inapplicable. The Court observes, however, that the default provisions of section 9053 do not apply where "otherwise provided by law." Chapter 478 expressly authorizes a suspension order for a minimum of 1 year, subject only to removal of the suspension as a result of administrative hearing or upon judicial review. Failure to request a hearing and/or judicial review by statute results in a final suspension order without any requirement of a default judgment. Thus, chapter 478 "otherwise provides by law" for a 1 year suspension order in those cases where administrative and judicial review is not requested without the necessity of a default.

The Administrative Procedures Act does not mandate a finding that Defendant's suspension order does not have the effect of a final judgment. In fact, pursuant to chapter 478 Defendant's uncontested orders are final agency actions as defined by 5 M.R.S.A. §8002(4) (1979):

> "Final agency action" means a decision by an agency which affects the legal rights, duties or privileges of specific persons, which is dispositive of all issues, legal and factual, and for which no further recourse, appeal or review is provided within the Agency.

Unappealed final agency actions have the effect of a final judgment. Small v. Gartley, 363 A.2d 724 (Me. 1976).

In Small v. Gartley the plaintiff attempted to collaterally attack a license suspension which had not been

appealed in accordance with statutory procedure. The Law court held that suspension orders of the Secretary of State

> when unreversed or unmodified in the manner provided by the pertinent legislation, have the effect of final judgments, and they cannot be attacked before a judicial forum other than that expressly set up by the legislature, for some alleged error of law, even of constitutional dimension, which might have been corrected on proper application to the court of last resort provided by the statute.
> Id. at 729.

Small v. Gartley cannot be distinguished from the case presently before the Court on the basis that it was decided prior to enactment of the Maine APA. Small was recently cited by the Law Court for the proposition that suspension orders of the Secretary of State may not be collaterally attacked "in the form of an

equitable action where the defendant has failed to timely utilize his adequate statutory remedy at the time suspension [is] imposed." Piacitelli v. Quinn, 449 A.2d 1126, 1128 (Me. 1982).

Plaintiffs' equitable action is precisely the type of collateral attack which Small v. Gartley addressed. Chapter 478 provides that upon receipt of the result of a blood alcohol test showing the presence of at least .02% weight of alcohol in the individual's blood, the Defendant "shall immediately notify the person, in writing ... that his provisional license has been suspended. The suspension shall be for a period of one year." 29 M.R.S.A. §2241-G(2)(B) (emphasis added). The Act further provides that an individual whose license has been suspended may contest

the existence of probable cause in an administrative hearing as well as seek review of the order of suspension in Superior Court pursuant to 29 M.R.S.A. §2242 (Supp. 1982-1983). Plaintiffs did not take advantage of the remedies provided by the Act. Instead, they filed this action for declaratory and injunctive relief more than thirty days after their licenses had been suspended. Pursuant to the APA and case law the Court the suspension orders rendered by Defendant against Plaintiffs have the effect of a final judgment.

The third element of the Utah Construction test is also satisfied. The Act provides Plaintiffs with a full, fair, and adequate opportunity to litigate and argue their version of the facts. Plaintiffs alone are responsible

for the fact that they did not request the hearings for which the Act provides.

Therefore, pursuant to United States v. Utah Construction & Mining Co. the doctrine of res judicata applies to Defendant's suspension orders so that this equitable action by Plaintiffs is barred. Recent Maine case law as well as that from the Federal District Court to Maine and the First Circuit supports this conclusion. The Maine rule governing application of the doctrine of "bar", which is quite similar to that enunciated in Utah Construction, was recently reaffirmed in Beegan v. Schmidt, 451 A.2d 642, 644 (Me. 1982):

> In order for the doctrine to be applied, the Court must satisfy itself that (1) the same parties, or their privies, are involved; (2) a valid final judgment was entered in the prior action, and (3) the

> matters presented for decision were, or might have been, litigated in the prior action.
>
> Citing Kradoska v. Kipp, 397 A.2d 562 (Me. 1979).

This principle has been applied in the context of section 1983 actions which are brought subsequent to a prior final judgment in state court. Lovely v. Laliberte, 498 F.2d 1261 (1st Cir. 1974), cert. denied, 419 U.S. 1033 (1974); Harrington v. Inhabitants of Garland, 551 F. Supp. 1371 (D. Me. 1982).4

A possible exception to the application of the doctrine of res judicata in section 1983 actions brought

4 Unappealed administrative decisions have been accorded preclusive res judicata effect in other jurisdictions. Snow v. Nevada Dept. of Prisons, 543 F. Supp. 752 (D. Nev. 1982); Moore v. Bonner, 526 F. Supp. 143 (D.S.C. 1981); Gear v. City of Des Moines, 514 F. Supp. 1218 (S.D. Iowa 1981).

in federal court (following final state court action) is "where state law did not provide for procedures for litigation of constitutional claims, or where a state court failed to even acknowledge the existence of the constitutional principle on which the litigant based his claim." Harrington, 551 F. Supp. at 1376 (citations omitted). Such is not the case under chapter 478, which provides for a judicial hearing in which the constitutionality of the chapter could be challenged. Additionally, Plaintiffs have made no offer of proof that they were prohibited from raising their constitutional claims in the proceedings for which the Act provides.

The Law Court's decision in Haskell v. Phinney, 460 A.2d 1354 (Me. 1983), involving a challenge to a decision by

the sheriff and county commissioners to indefinitely suspend a deputy sheriff, does not not require the Court to alter its conclusion. In Haskell the Plaintiff did not permit the administrative decision to become final and unappealable. Plaintiff timely appealed the initial decision of the sheriff to the county commissioners as provided for by statute. 30 M.R.S.A. §§64-A(3), 951 (Supp. 1981-1982). Additionally, Plaintiff filed a two count complaint pursuant to M.R. Civ. P. 80B, and 42 U.S.C. §1983 within the time limit set forth in Rule 80B. At no time in Haskell v. Phinney did a judgment adjudicating the merits of Plaintiffs' claims become final and unappealable.

In summary, Plaintiffs' failure to seek administrative and judicial review

of the Secretary of State's decision to suspend their licenses effectively resulted in a final judgment of the Secretary of State which must be recognized by this Court as a bar to collateral litigation of any issue which was or could have been litigated initially. Plaintiffs could have brought their presently asserted claims before this Court in a judicial review of the Secretary's action pursuant to 5 M.R.S.A. §§11007-11009. (1979 & Supp. 1982-1983). The initial suspension of the Secretary of State is now final. The same parties are involved in this action as were involved in the administrative proceeding. Under the principles outlined above, this section 1983 action is precluded and must be dismissed for failure to state a claim upon which relief can be granted.

It is hereby ORDERED and DECREED and the entry shall be:

1. Plaintiffs' Motion for Class Certification is DENIED.

2. Defendant's Motion to Dismiss Plaintiffs' Complaint, which has been treated as a motion for summary judgment, is GRANTED. Complaint dismissed, judgment for Defendant.

Dated: 01/12/84

/s/ Morton A. Brody

MORTON A. BRODY
Justice,
Superior Court

STATE OF MAINE

DEPARTMENT OF STATE
MOTOR VEHICLE DIVISION
AUGUSTA, MAINE 04333

08/16/83

NOTICE OF SUSPENSION AND OPPORTUNITY FOR HEARING

WILLIAM R. MAINES
11 PINE ST.
SOUTH PORTLAND, ME. 04106 M520

LICENSE NUMBER:
DATE OF BIRTH: 05/18/65

You are hereby notified that acting under the authority vested in the Secretary of State of the State of Maine by the

provisions of 29 M.R.S.A. Section 2241-G(2)(B) your license or permit to operate, right to operate a motor vehicle or right to apply for or obtain a license in the State of Maine is suspended effective 08/30/83 for at least a one year period because you have violated certain provisions of this title as follows:

> Report of operating, or attempting to operate, a motor vehicle with 0.02% or more by weight of alcohol in your blood on July 29, 1983.

If you have been issued a valid Maine drivers license, you are hereby ordered to return your license to this office by 08/30/83 using the enclosed envelope.

The further operation by you of any motor vehicle upon the highways of this state, until your right to operate has been restored, will be in violation of the

laws of this state for which you will be liable to arrest and prosecution.

HEARING

You have the opportunity to request a hearing, in writing, prior to 09/09/83. That hearing, if requested, will be held pursuant to 29 M.R.S.A. Section 2241-G, 5 M.R.S.A. Section 9051 to 9064 and Chapter 2, rules for hearings of the Secretary of State (including the right to subpoena witnesses), and the suspension will remain in effect pending the outcome of such hearing.

Your suspension may be terminated and license restored on 08/30/84 provided you have met the following conditions:

1. After you complete and return the enclosed document with a

reinstatement fee of $20.00 to the Secretary of State.

2. After having served a mandatory 6 month suspension period, your driving privileges may be restored, with conditions, after satisfactory completion of the Department of Human Services' Driver Education Evaluation Program and, when required, an alcohol evaluation or treatment program.

Information concerning the Driver Education Evaluation Program and an alcohol treatment program may be obtained at the Department of Human Services, telephone 289-2054 or 289-2028.

YOU MAY NOT DRIVE A MOTOR VEHICLE UNTIL YOU RECEIVE WRITTEN NOTICE THAT YOUR LICENSE OR RIGHT TO OPERATE HAS BEEN RESTORED.

/s/ George E. Storer

George E. Storer

Deputy Secretary of State

Reply or Questions Should be Addressed to: DRIVER LICENSING AND CONTROL

TELEPHONE: 207-289-3636

STATE OF MAINE

DEPARTMENT OF STATE

MOTOR VEHICLE DIVISION

AUGUSTA, MAINE 04333

07/29/83

NOTICE OF SUSPENSION AND OPPORTUNITY FOR HEARING

PETER K. GUTHRIE

26 ELM ST.

ELLSWORTH, ME 04605 G360

LICENSE NUMBER: 1286123

DATE OF BIRTH: 09/09/65

You are hereby notified that acting under the authority vested in the Secretary of State of the State of Maine by the

provisions of 29 M.R.S.A. Section 2241-G(2)(B) your license or permit to operate, right to operate a motor vehicle or right to apply for or obtain a license in the State of Maine is suspended effective 08/12/83 for at least a one year period because you have violated certain provisions of this title as follows:

> Report of operating, or attempting to operate, a motor vehicle with 0.02% or more by weight of alcohol in your blood on July 19, 1983.

You are hereby ordered to return your license to this office by 08/12/83 using the enclosed envelope.

The further operation by you of any motor vehicle upon the highways of this state, until your right to operate has been restored, will be in violation of the

laws of this state for which you will be liable to arrest and prosecution.

HEARING

You have the opportunity to request a hearing, in writing, prior to 08/22/83. That hearing, if requested, will be held pursuant to 29 M.R.S.A. Section 2241-G, 5 M.R.S.A. Section 9051 to 9064 and Chapter 2, rules for hearings of the Secretary of State (including the right to subpoena witnesses), and the suspension will remain in effect pending the outcome of such hearing.

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1. After you complete and return the enclosed document with a

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/s/ George E. Storer

George E. Storer

Deputy Secretary of State

Reply or Questions Should be Addressed to: DRIVER LICENSING AND CONTROL
TELEPHONE: 207-289-3636

STATE OF MAINE
KENNEBEC, SS.

SUPERIOR COURT
CIVIL ACTION
DOC. NO. CV-83-544

PETER C. WILLIAMSON,

Petitioner

vs.

SECRETARY OF STATE,[1]

Respondent

OPINION AND ORDER

This matter is before the Court on appeal from refusal by the Secretary of State to restore Petitioner's right to operate a motor vehicle, after hearing, which right had been suspended for one year pursuant to the provisions of 29 M.R.S.A. §2241-G-2-B. Appeal is brought

1 The caption is changed as authorized by Rule 25(d)(2) M.R. Civ. P. and in accordance with the form suggestion of the Law Court in Gordon v. State Tax Assessor, 455 A.2d 57 (Me. 1983).

pursuant to the provisions of Rule 80C M.R. Civ. P., 29 M.R.S.A. §2242 and 5 M.R.S.A. §11001 et seq.

The statute at issue, 29 M.R.S.A. §2241-G-2-B, commonly known as the "Teen Drinking Law", authorizes the Secretary of State to suspend the provisional driver's license of a person under twenty years old, for a period of one year, where that person is found to have been operating a motor vehicle and, at the time of the operation has 0.02 percent, or more by weight of alcohol in their blood, as measured by an approved testing procedure. Under that statute, when the Secretary of State receives notification from a law enforcement agency that a person under 20 has engaged in the proscribed conduct, the Secretary of State issues a suspension of that

person's right to operate. The person notified of the suspension has a right to request a hearing before a hearing officer of the Motor Vehicle Division. However, the request for hearing does not stay the effect of the suspension. Further, by statute issues which may be addressed at that hearing are limited to: "Whether there was probable cause to believe that the person was operating or attempting to operate a motor vehicle while having 0.02 percent or more by weight of alcohol in his blood." Thus the issues allowed to be contested at hearing are more narrow than the proscribed conduct, being limited simply to the officer's probable cause and excluding the broader question of whether the person was operating and whether the person actually had a blood alcohol content of 0.02 percent or more at the

time of operation. An issue on this second point would, necessarily, involve the validity of any test results utilized as a basis for the suspension.

The facts relevant to this appeal are not in serious dispute:

On August 27, 1983, Peter C. Williamson was 19 years old and operating with a provisional, under age of 20, license, 29 M.R.S.A. §2241-G-2. He was stopped by a police officer who had probable cause to believe that Mr. Williamson was operating a motor vehicle on Route 1 in Scarborough in a manner which suggested he might be under the influence of intoxicating liquor. Mr. Williamson took a balloon test, and the testing laboratory subsequently reported back to the Scarborough Police Department

a test result of .04 percent blood alcohol content. The Secretary of State was then duly notified of the apparent violation of the Teen Drinking Law.

On September 9, 1983 the Secretary of State notified Mr. Williamson of the requisite one year suspension to become effective September 23, 1983. Mr. Williamson also was notified of his right to a hearing which was duly requested.

The hearing was held on October 20, 1983. The hearing officer indicated, at that time, that issues at the hearing were limited to whether "there was probable cause to believe that the petitioner, Mr. Williamson, was operating or attempting to operate a motor vehicle with a .02 percent or more by weight of alcohol in the blood." Mr. Williamson,

through counsel at the hearing, objected to this limitation but did not attempt to present evidence at the hearing. After the hearing, the hearing officer denied Mr. Williamson's petition to have his right to operate restored based solely on his finding that "there was sufficient probable cause to believe that Mr. Williamson was operating a motor vehicle with .02 percent or more by weight of alcohol in the blood." A timely appeal was then taken to this Court.

Before the Court, Mr. Williamson raises two objections. First, he argues that 29 M.R.S.A. §2241-G-2 is unconstitutional in that limitation of the issues at the hearing before the Secretary of State deprived him of due process of law secured to him by Article I, §6-A of the Maine Constitution and the

Fifth and Fourteenth Amendments of the United States Constitution.

He also argues that there was insufficient evidence to support a finding that the Petitioner, at the time of operation, was under 20 years of age. This second contention is quickly disposed of. At the time of the operation, the Petitioner possessed a provisional license of the type issued, pursuant to 29 M.R.S.A. §2241-G-2 to persons under 20 years of age. Possessing such a license, his status as a person under 20 years of age was established, subject to any rebuttal of the issue which Petitioner might choose to present. No rebuttal was presented at hearing, and the Petitioner's status was therefore sufficiently established.

The Petitioner's due process claim, however, raises an important constitutional concern. It is well established that whether one considers a motor vehicle operator's license a "right" or "privilege" a person whose operator's license is to be suspended must be afforded the opportunity to contest that suspension through a hearing, Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586 (1971); Mackey v. Montrym, 433 U.S. 1, 99 S.Ct. 2612 (1979). Further, to be effective, a hearing right must necessarily include the opportunity for a petitioner to contest those elements of the proscribed conduct of which the petitioner is accused and which have led to the suspension. Thus Bell v. Burson, supra held that a hearing which excluded from the contest an element essential to the decision of whether the license

should be suspended could not satisfy federal due process standards, 402 U.S. at 542, 91 S.Ct. at 1591.

In the instant case, 29 M.R.S.A. §2241-G-2-B appears to establish proscribed conduct leading to a year's license suspension which includes two elements:

1. That the person is operating a motor vehicle, and

2. That at the time of operation, the person's blood alcohol content, reported through a test result, indicates the presence of .02 percent or more by weight of alcohol in the blood.

These are the elements of the proscribed conduct, but they are not the elements addressed at the administrative

hearing. The administrative hearing is narrowly restricted to the question of whether the stopping officer had probable cause to believe that the person was operating a motor vehicle while having .02 percent or more by weight of alcohol in the blood. This restriction in effect deprives persons seeking administrative hearings of opportunity to contest both of the elements of the proscribed conduct which trigger the year's suspension. They may contest neither the operation of the motor vehicle, nor the question of blood alcohol content. In this case, because of the restriction on the issues at the hearing, the hearing officer, at the conclusion of the hearing, did not make findings regarding either of the elements of the proscribed conduct.

Such a restriction violates the principles of due process established in Bell v. Burson, supra indicating a right to a hearing which allows the petitioner to contest the elements of the proscribed conduct with which he is charged.

In response to Petitioner's arguments, the State has urged two alternative constructions of the statute which may most charitably be described as creative but fanciful. First, the State argues that while probable cause would be the issue at the administrative hearing, petitioners would have a right to contest the specific elements of proscribed conduct in a de novo proceeding on appeal before the Superior Court. Such is inconsistent with the clear contemplation of the Legislature. The paragraph of 2241-G-2-B addressing petitions to

Superior Court makes specific reference to 29 M.R.S.A. §2242. Section 2242 expressly addresses the issue of appeals to Superior Court after administrative hearings before the Secretary of State. This section makes specific reference to 5 M.R.S.A. §11001, the appeal provisions of the Administrative Code, as governing appeals brought pursuant to section 2242. With this reference, there is no doubt that the Legislature contemplated that appeals from the Secretary of State would not be "de novo" but would only involve review of the Secretary of State's decision for errors of law in accordance

with the principles of administrative appeal established in 5 M.R.S.A. §11007.[2]

Further confirmation of the Legislature's intent is indicated by the sentence in section 2241-G-2-B which states that suspension shall remain in effect pending hearing. It is highly unlikely that the Legislature, being generally cognizant of constitutional principles, would have adopted such a provision had they contemplated the delays which would be necessarily incident to a full de novo hearing in Superior Court. Other implications of

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[2] In a pre-Administrative Code decision, Small v. Gartley, 363 A.2d 724 (Me. 1976), the Law Court held that §2241 gives the Secretary of State exclusive authority to hear and find the facts relating to license suspensions "to the exclusion of the judiciary except for statutory review of the administrative decision, Id. at 730.

this interpretation were discussed thoroughly with counsel at hearing and are not further addressed in this opinion.

Alternatively, the State urges that the Teen Drinking Law can indeed be interpreted to allow contest regarding both of the elements o proscribed conduct at the administrative hearing. First, it must be noted that such a broader view of the hearing issues did not occur at the hearing in the Petitioner's case. Second, if the interpretation offered by the Attorney General is correct, then the words of limitation in the section authorizing the administrative hearing "there was probable cause to believe that" would be effectively stricken from the statute. However, the issue of probable cause is addressed several times

in the statute. Considering that address, it is impossible to believe that the Legislature did not intend to restrict the scope of the hearings as they specifically said they intended to restrict the scope of the hearings.

Where the plain meaning of the statute appears, statutes will be given their plain meaning. Courts will only resort to alternative methods for statutory construction when the plain meaning of statutes is not apparent on their face. Here, the statute says that the issue at the administrative hearing is restricted to the question of probable cause, and the State must accept that interpretation even with the constitutional problems it poses.

Accordingly, the provisions of 29 M.R.S.A. §2241-G-2-B which limit the scope of the administrative hearing to the question of whether an officer had probable cause to believe that a person was operating a motor vehicle with a .02 percent or greater blood alcohol content is an unconstitutional violation of the right to due process secured to the Petitioner and others by Article I, §6-A of the Maine Constitution and the Fifth and Fourteenth Amendments of the United States Constitution.

The Court recognizes the deference it is required to pay to legislative action, and the caution with which it must approach declarations of constitutional invalidity. But The Court emphasizes that in its view, the constitutional violation of the hearing

issues restriction is rather evident. It is not a particularly close question.

Reaching that determination, however, does not entirely resolve the case. The severability section of the Rules of Construction, 1 M.R.S.A. §71-8,[3] establishes that the provisions of any state law are severable and that if any portion of a law is deemed invalid, such invalidity does not affect other provisions of the law which can be given effect without the invalid portion. By this opinion, only the paragraph of the

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3 1 M.R.S.A. §71-8 reads as follows:

> The provisions of the statutes are severable. The provisions of any session law are severable. If any provision of the statutes or of a session law is invalid, or if the application of either to any person or circumstance is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application.

Teen Drinking Law which restricts the issues at hearing and the findings which the hearing officer may render is being held unconstitutional. The remainder of the Teen Drinking Law is not being contested. In fact, at oral argument, counsel for the Petitioner indicated that he was not even contesting the portion of the law which prohibits stay of suspension pending hearing.

The fact that the "hearing" portion of the Teen Drinking Law is being held invalid does not require that the whole law be invalidated. An independent hearings provision is not essential to the validity of 29 M.R.S.A. §2241-G-2-B. The Maine Administrative Procedure Act provides a backup hearing provision for every statute where a hearing may be constitutionally required. Thus, 5

M.R.S.A. §8002-1 defines an adjudicatory proceedings as: "Any proceeding before an agency in which the legal rights, duties or privileges of specific persons are required by constitutional law or statute to be determined after an opportunity for hearing." Bell v. Burson, supra and Mackey v. Montrym, supra establish the constitutional necessity of an opportunity for hearing, incident to license suspension under the Teen Drinking Law. That hearing may be provided, directed to the question of whether the proscribed conduct has been committed, in accordance with the procedures established for adjudicatory hearings pursuant to 5 M.R.S.A. §9051 et seq. The §9051 hearing can provide all the necessary elements of due process and address to the two key issues which the Secretary of State must determine in this

case, operation of a motor vehicle and blood alcohol content of .02 percent or more.

The Administrative Code adjudicatory hearing requirements also include public notice requirements which may be potentially burdensome and unnecessary in this case, 5 M.R.S.A. §9052-3, but that does not mean that the adjudicatory hearing procedures specified in the Administrative Code may not be invoked by the Secretary of State as a backup pending legislative "clarification" in light of this ruling invalidating the specific hearing limitations in the Teen Drinking Law.

Thus, in accordance with the provisions of 1 M.R.S.A. §71-8 the provisions of the Teen Drinking Law need

not be invalidated in entirety, simply because of the constitutional invalidity of the restrictions on the administrative hearing set out in that law. Instead, the §2241-G-2-B hearing restrictions may be invalidated and the adjudicatory hearing provisions of the Administrative Code may be relied upon to provide the constitutionally required opportunity for hearing which is necessary for suspension of any right to operate under the Teen Drinking Law. Interestingly, the Court notes that the utilization of the Administrative Procedure Act adjudicatory hearing provisions was specifically addressed, by reference to 5 M.R.S.A. §9051 through 9064, in the notice of suspension mailed to Mr. Williamson on September 9th.

In this case, because both Petitioner and the State proceeded under an invalid hearing procedure, the results of that hearing procedure must be vacated and the matter must be remanded to the Secretary of State for a new hearing in accordance with the adjudicatory hearing provisions of the Administrative Procedure Act. In the new hearing, the Petitioner must be given full opportunity to contest the two critical elements of proscribed conduct -- operation and blood alcohol content of .02 percent or more -- which are necessary prerequisites to the one year suspension of his right to operate.

Because of the long period of time which the Petitioner has endured a suspension of his right to operate while proceeding through and contesting an

invalid hearing process, the Court believes that justice and equity requires that, pending final determination after administrative hearings and any appeal, the Secretary of State's suspension of the Petitioner's right to operate should be vacated and the Petitioner's right to operate should be restored.

Therefore, the Court ORDERS, and the entry shall be:

1. Appeal SUSTAINED.

2. Decision of the Secretary of State refusing to restore Petitioner's right to operate is VACATED.

3. The matter is REMANDED to the Secretary of State for a new hearing on the issues of proscribed conduct in accordance with the provisions of this opinion.

4. Pending further hearing, and the results of any further hearing becoming final, the Secretary of State's suspension of the Petitioner's right to operate is stayed and the Secretary of State is ordered to restore to the Petitioner his right to operate, assuming he otherwise qualifies.

/s/ Donald G. Alexander

Dated: 02/28/84

DONALD G. ALEXANDER
Justice,
Superior Court

APPENDIX C

STATE OF MAINE

P.L. 1983

CHAPTER 478

H.P. 1326 - L.D. 1761

AN ACT to Deter Drinking and Driving by Teenagers.

Emergency preamble. Whereas, Acts of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, the 90-day period may not terminate until the fall of 1983; and

Whereas, the lives of several teenagers have already been lost this year in alcohol-related accidents; and

Whereas, the combination of drinking and driving by underaged individuals inexperienced in both activities constitutes a real and immediate danger to the lives and safety of themselves and others on the Maine highways; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,

Be it enacted by the People of the State of Maine as follows:

29 MRSA §2241-G, as enacted by PL 1977, c.694, §526, is repealed and the following enacted in its place:

§2241-G. Provisional license

1. Licensee 20 years of age and older. The original state license issued to a new applicant 20 years of age and older shall be a provisional license for a period of one year following the date of issue and shall remain in force as a nonprovisional license to the next normal expiration date. If a person is convicted of or adjudicated to have committed a motor vehicle moving violation while in possession of a provisional license on the first offense, the license shall be suspended for 30 days. If he is convicted of or adjudicated to have committed a 2nd moving violation, his license shall be suspended for 60 days and if he is convicted of or adjudicated to have committed a 3rd moving violation, the

license shall be suspended to the 2nd birthday next following the date of issue or for 90 days, whichever shall be the longer period of time. In these cases, a hearing may be requested of the Secretary of State, and the Secretary of State shall afford the provisional licensee opportunity for hearing as soon as practicable after receipt of the request. Upon the hearing, the Secretary of State, for good cause shown, may continue, modify or rescind the suspension. This subsection shall not prevail when a person is convicted of or adjudicated to have committed an offense which carries a suspension or revocation period greater than that prescribed in this subsection.

2. Licensee under 20 years of age. The original license or any renewal license issued to an applicant under 20

years of age shall be a provisional license for a period of one year following the date of issue or until the licensee attains the age of 20 years of age, whichever occurs last. Upon expiration of the provisionary term, the license shall remain in force as a nonprovisional license to the next normal expiration date. Any license issued by any other jurisdiction to a person who has not yet attained the age of 20 years shall be construed to be a provisional license for the purpose of operating a motor vehicle within this State.

A. During the first year from the date of issue of the provisional license, if a person is convicted of or adjudicated to have committed a motor vehicle moving violation, on the first offense, the license shall be suspended

for 30 days. If he is convicted of or adjudicated to have committed a 2nd moving violation, his license shall be suspended for 60 days and if he is convicted of or adjudicated to have committed a 3rd moving violation, the license shall be suspended to the 2nd birthday next following the date of issue or for 90 days, whichever shall be the longer period of time. In these cases, a hearing may be requested of the Secretary of State, and the Secretary of State shall afford the provisional licensee opportunity for hearing as soon as practicable after receipt of the request. Upon the hearing, the Secretary of State, for good cause shown, may continue, modify or rescind the suspension. This paragraph shall not prevail when a person is convicted of or adjudicated to have committed an offense which carries a

suspension or revocation period greater than that prescribed in this paragraph.

B. The Secretary of State shall suspend for a minimum period of one year, without preliminary hearing, the provisional license of any person under 20 years of age:

(1) As to whom there is received a record of conviction or adjudication for violation of section 1312-B or 1312-C or Title 15, section 3103, subsection 1, paragraph F; or

(2) As to whom there is received the result of a test to determine his blood-alcohol level which shows the presence of 0.02% or

more by weight of alcohol in his blood.

Any person not having attained the age of 20 years who operates or attempts to operate a motor vehicle within this State shall, in addition to the requirements of section 1312, have the duty to submit to a test to determine his blood-alcohol level by analysis of his blood or breath, if there is probable cause to believe he has operated or attempted to operate a motor vehicle while having 0.02% or more by weight of alcohol in his blood. The provisions of section 1312 shall apply, except that in all cases probable cause shall be to believe that the person was operating or attempting to operate a motor vehicle while having 0.02% or more by weight of alcohol in his blood and that the suspension for failing to comply

with the duty to submit to the test shall be for a period of one year.

The provision of section 1312, subsection 6, shall apply, except that probable cause shall be to believe that the person was operating or attempting to operate a motor vehicle while having 0.02% or more by weight of alcohol in his blood.

The Secretary of State, upon receipt of both a written statement under oath from a law enforcement officer that the officer had probable cause to believe that a person was operating or attempting to operate a motor vehicle while having 0.02% or more by weight of alcohol in his blood and the result of a blood-alcohol test taken under this section which shows the presence of 0.02% or more by weight of alcohol in his blood, and which is

certified pursuant to section 1312, subsection 8, shall immediately notify the person, in writing, as provided in section 2241, that his provisional license has been suspended. The suspension shall be for a period of one year. The written statement shall be sent to the Secretary of State, within 72 hours of receipt by the officer, of the results of the test, excluding Saturdays, Sundays and holidays, provided that if the statement is not sent within this time period, the Secretary of State shall nevertheless impose the suspension upon receipt, unless the delay has prejudiced the person's ability to prepare for or participate in the hearing. If a person, whose license is so suspended, desires to have a hearing, he shall so notify the Secretary of State in writing within 10 days from the effective date of the

suspension. The suspension shall remain in effect pending the hearing.

The scope of the hearing shall cover whether there was probable cause to believe that the person was operating or attempting to operate a motor vehicle while having 0.02% or more by weight of alcohol in his blood. If it is determined after the hearing that there was not probable cause to believe that the person was operating or attempting to operate a motor vehicle while having 0.02% or more by weight of alcohol in his blood, the suspension shall be removed immediately and the Secretary of State shall delete any record of the suspension.

Any person whose provisional license is suspended under this section on the basis

of a blood-alcohol test shall have the right to file a petition in the Superior Court in the county where he resides, or in Kennebec County, to review the order of suspension by the Secretary of State by the same procedure as is provided in section 2242. If the court rescinds the suspension, it shall also order the Secretary of State to delete any record of the suspension.

C. Any suspension issued under paragraph B shall run concurrently with any suspension ordered by a court upon conviction or adjudication of any violation of section 1312-B or 1312-C or Title 15, section 3103, subsection 1, paragraph F.

D. Following the expiration of 1/2 of the total period of suspension imposed

pursuant to paragraph B, the Secretary of State may issue a provisional license, subject to the conditions, restrictions or terms he deems advisable, to the person if he receives written notice that the person has satisfactorily completed the alcohol education program of the Department of Human Services and, when required, has satisfactorily completed an alcohol treatment or rehabilitation program approved or licensed by the department.

E. Any suspension pursuant to paragraph B or provisional license reissued after suspension pursuant to paragraph D may extend beyond the person's 20th birthday to allow for completion of the total suspension period or to continue the period of conditions,

restrictions or terms imposed on a license reissued pursuant to paragraph D.

F. The Secretary of State may promulgate whatever rules are necessary to carry out the purposes of this section.

Emergency clause. In view of the emergency cited in the preamble, this Act shall take effect when approved.

APPENDIX D

STATE OF MAINE

CUMBERLAND COUNTY

AFFIDAVIT

I, William R. Maines, being first duly sworn, depose and say:

1. My name is William R. Maines and I reside at 111 Pine Street, South Portland, Maine. My date of birth is May 18, 1965. I weigh approximately 150 pounds. I have been a licensed driver in Maine since September 24, 1982.

2. On or about August 17, 1983, I received a notification from the Maine Secretary of State advising me that my license to drive was suspended effective

August 30, 1983 for at least a one year period because of a report that I had violated 29 M.R.S.A. Sec. 2241-G(2)(B) by operating a motor vehicle with 0.02% or more by weight of alcohol in my blood on the early morning hours of July 29, 1983.

3. While I had consumed some alcoholic beverage on the night of July 28, 1983, my ability to drive was at no time impaired in the slightest degree. As stated in the report of Officer Shepard, a true copy of which is attached hereto, I was driving slowly at one point along Route 302 in Windham since I was looking for a turn-off, the precise location of which was unfamiliar to me. At no time did my slow speed interfere with the flow of traffic or endanger safety. I believe I was the only car on the road in this area at the time.

4. I did not request a hearing by the Secretary of State because, from what I had heard about the new "Teen Drinking" bill, there was not anything I could really do about my suspension.

5. I am a senior in high school and consider myself to be a thoughtful and mature person, capable of making my own decisions. I need my license to drive my ailing mother where she needs to go, as well as to go back and forth to my part-time job.

/s/ William R. Maines

Date: 09/29/83

William R. Maines

Personally appeared William R. Maines and made oath that the above Affidavit is true to the best of his personal knowledge.

Date: 09/29/83

/s/ Stanley Greenberg
Attorney-at-Law

STATE OF MAINE

HANCOCK COUNTY

AFFIDAVIT

I, Peter K. Guthrie, being first duly sworn, depose and say:

1. My name is Peter K. Guthrie and I reside at 26 Elm Street, Ellsworth, Maine. My date of birth is September 9, 1965. I weigh approximately 150 pounds. I have been a licensed driver in Maine since March, 1981.

2. On or about July 30, 1983, I received a notification from the Secretary of State advising me that my license was suspended effective August 12, 1983 for at least a one year period

because of a report that I had violated 29 M.R.S.A. Sec. 2241-G(2)(B) by operating a motor vehicle with 0.02% or more by weight of alcohol in my blood on July 19, 1983.

3. While I had consumed some beer on July 19, 1983, my ability to drive was at no time impaired in the slightest degree. Contrary to the report of Officer Gomaine, a true copy of which is attached hereto, I did not force oncoming traffic on Cottage Avenue to pull over, although my vehicle may have been slightly over the center line.

4. I did not request a hearing by the Secretary of State because of the expense of hiring an attorney and because I didn't think that a hearing would do me

any good given the limited scope of the hearing available to me.

5. I am a senior in high school and consider myself to be a thoughtful and mature person, capable of making my own decisions.

/s/ Peter K. Guthrie

Date: 09/28/83

Peter K. Guthrie

Personally appeared Peter K. Guthrie and made oath that the above Affidavit is true to the best of his personal knowledge.

/s/ Anthony W. Beardsley

Date: 09/28/83

Notary Public
(seal)

APPENDIX E

RAISING OF FEDERAL QUESTIONS

A. PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS.

. . . .

ARGUMENT

I. THIS ACTION IS NOT BARRED BY THE DOCTRINE OF RES JUDICATA.

. . . .

2. Plaintiffs Were Not Provided With a Full, Fair, and Adequate Opportunity to Litigate The Facts of Their Cases.

Even if the court were to assume, arguendo, that a final judgment had been entered by the Secretary of State, the third prong of the Utah Construction test would remain unsatisfied. The hearing

specified by c.478 creates a conclusive presumption that the blood alcohol test, relied upon by the Secretary of State in suspending the teenager's license, is accurate. Indeed, c.478 removes entirely from "judicial" determination the issue of whether the teenager was actually driving with a blood alcohol level in excess of the minimum.

In practice, as conceded by the State, no evidentiary showing, by way of foundation or otherwise, is required at the administrative hearing to support the admissibility or validity of the blood alcohol test. As further conceded by the State, the hearing officers at these hearings do not allow the admission of any evidence submitted by the defense to impeach the evidentiary weight to be accorded the blood-alcohol test.

As argued at length in Plaintiffs' Memorandum in Support of their Motion for a Temporary Restraining Order, c.478 on its face, and as applied by the Secretary of State, thus contravenes fundamental concepts of due process of law and contradicts the Maine APA which requires, in §9056(2), the right to be heard fully on all issues.

Because of the egregious defects in the hearing process under c.478, any final judgment actually entered could not be given res judicata effect.

Moreover, Plaintiffs could not have litigated their constitutional claims in a hearing held under c.478 since the Secretary of State is not empowered to rule on such claims. For this additional reason, any final judgment rendered by

the Secretary of State could not bar Plaintiffs from litigating their constitutional claims in this proceeding. Cf., Kradoska v. Kipp, 397 A.2d 562, 565 (Me. 1979); Snow v. Nevada Dept. of Prisons, 543 F.Supp. 752, 757 (D. Nev. 1982).

B. MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER

. . . .

c. The Probability of Success on the Merits

. . . .

1. Due Process

The United States Supreme Court has consistently held in motor vehicle

license cases, that the suspension of such a license implicates due process. Bell v. Burson, 402 U.S. 535, 29 L.Ed.2d 90, 91 S.Ct. 1586(1971); Dixon v. Love, 431 U.S. 105, 52 L.Ed.2d 172, 97 S.Ct. 1723 (1977); Mackey v. Montrym, 433 U.S. 1, 61 L.Ed.2d 321, 99 S.Ct. 2612 (1979).

The Georgia statute in Bell v. Burson subjected the motor vehicle registration and driver's license of an uninsured motorist to suspension if he were involved in an accident and failed to post security to cover damages. The Court held that before the state could suspend the license, procedural due process required a determination whether there was a reasonable possibility of a judgment being rendered against the licensee. 29 L.Ed.2d 91, 95. The administrative hearing that was available

prior to the suspension excluded consideration of the motorist's fault or liability for the accident. Id. at 92-93. The petitioner had appealed the suspension in the Superior Court where such evidence of liability was permitted, was found free from fault and it was ordered that his license not be suspended. However, the order was reversed by the Georgia Ct. of Appeals in overruling the petitioner's constitutional contention. The United States Supreme Court applied "the general proposition that relevant constitutional restraints limit state power to terminate an entitlement, whether the entitlement is denominated a "right" or a "privilege" (Id., at 94) and held that the administrative hearing "need not take the form of a full adjudication of the questions of liability" but that

procedural due process did require an inquiry to determine whether there is a reasonable possibility of judgment against the licensee. Id., at 95.

P.L. 1983, c.478 provides that the "Secretary of State shall suspend for a minimum period of one year, without preliminary hearing, the provisional license of any person under 20 years of age ... as to whom there is received the result of a test to determine his blood-alcohol level which shows the presence of 0.02% or more by weight of alcohol in his blood." 29 M.R.S.A. §2241-G(2)(B)(2). The statute provides that the Secretary of State shall notify the licensee that his license has been suspended, upon receipt of both (1) a written statement under oath from a law enforcement officer that the officer had probable cause to

believe that said licensee was operating a motor vehicle "while having .02% or more by weight of alcohol in his blood" and (2) a certified blood-alcohol test reflecting said blood alcohol content. 29 M.R.S.A. §2241-G(2)(B)(2).

Should the person whose license has already been suspended desire a hearing, he may request the same within 10 days of the effective date of the suspension. However, the scope of the hearing is expressly limited to the issue of "whether there was probable cause to believe that the person was operating or attempting to operate a motor vehicle while having .02% or more by weight of alcohol in his blood." 29 M.R.S.A. §2241-G(2)(B)(2). The further right of the person whose license has been suspended to file a petition in Superior

Court is governed by 5 M.R.S.A. §11006, which confines the judicial review to the record upon which the agency decision was based. The accuracy and administration of the blood-alcohol test is not subject to question at any time. The hearing is thus totally ineffective and deprives one of a valuable entitlement - the license - for a period of one year, without due process of law.

In Mackey v. Montrym, supra, the United States Supreme Court upheld a Massachusetts Statute which mandates suspension of a driver's license for refusing to take a breath-analysis test, only after noting that the statute provided an "immediate hearing before the Registrar at any time after he had surrendered his license; that hearing would have resolved all questions as to

whether grounds existed for the suspension." 433 U.S. 1, 7. Similarly, in Dixon v. Love, supra, the U.S. Supreme Court upheld an Illinois statute providing for the automatic suspension or revocation of a driver's license upon the conviction of not less than 3 moving violations. The Court noted that the appellee had the opportunity for a full judicial hearing in connection with each of the traffic convictions, as well as a full administrative hearing after the suspension, and that he had not challenged the adequacy of the administrative hearing. The Court held that "licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment," but also that "[i]t is equally clear that a licensee in Illinois eventually can obtain all the safeguards procedural due

process could be thought to require before a discretionary suspension or revocation becomes final." 52 L.Ed.2d 172, 180, citing Bell v. Burson, supra at 539.

Under P.L. 1983, c.478, persons suspended by the Secretary of State are not accorded a full and meaningful opportunity for hearing. In fact, the legislation creates the conclusive presumption that a blood-alcohol test certificate, properly certified and submitted to the Secretary of State, is correct and immune from rebuttal. This aspect of the law, in and of itself, contravenes fundamental notions of due process.

In a prosecution for operating under the influence or excessive blood-alcohol,

the State may take advantage of the blood-alcohol certificate in establishing a prima-facie case. 29 M.R.S.A. §1312(8). However, the Defendant in such a case has the right to demand that the State produce qualified witnesses to establish the requisite foundation for such a scientific test.

The requirements for this foundation were set forth in State v. Brewer, 344 A.2d 54, 56 (Me. 1976) and recently reaffirmed in State v. Libby, 453 A.2d 481, 488 (Me. 1982). Under the revisions to §1312, before a blood-alcohol test certificate may be given any evidentiary weight (and assuming a request for qualified witnesses has been made) (1) a suffficient foundation as to the quality of the contents of the sample kit and/or sample apparatus must be shown; (2) the

person conducting the test must be shown to be qualified; (3) the ingredients and equipment used in the testing process must be shown to be of appropriate quality; (4) the functions of the various chemicals used in the test must be explained to demonstrate the reliability of the ultimate analysis.

In one fell swoop, c.478 eliminated the requirement that the State meet the Brewer standards before the blood-alcohol test is accorded evidentiary weight and prohibited persons subject to the law from attacking the validity of the test because of sampling and/or testing deficiencies.

The leading case on the constitutional limitations on the Legislature's power to establish

evidentiary presumptions is Mobile, J. and K. C. R. Co. v. Turnipseed, 219 U.S. 35, 55 L.ED. 78, 31 S.Ct. 136 (1910). There Justice Burton wrote that

> "... for a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed."
>
> "If a legislative provision not unreasonable in itself prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him." Id., at 43. (Emphasis supplied).

Since c.478 creates a conclusive presumption, based upon the blood-alcohol test, that a person did in fact have a blood-alcohol level greater than or equal to .02% by weight, it denies Plaintiffs due process of law.

. . . .

C. DECISION AND ORDER
KENNEBEC COUNTY SUPERIOR COURT
MAINES, et al. vs. QUINN
DOC. NO. CV-83-467

. . . .

The third element of the Utah Construction test is also satisfied. The Act provides Plaintiffs with a full, fair, and adequate opportunity to litigate and argue their version of the facts. Plaintiffs alone are responsible

for the fact that they did not request the hearings for which the Act provides.

Therefore, pursuant to United States v. Utah Construction & Mining Co., the doctrine of res judicata applies to Defendant's suspension orders so that this equitable action by Plaintiffs is barred.

. . . .

D. BRIEF OF THE APPELLANTS FILED ON APPEAL TO THE MAINE SUPREME JUDICIAL COURT

. . . .

ARGUMENT

I.

B. The Secretary of State Did Not Render a Judgment On The Factual Disputes Relevant to the Issues Properly Before It

. . . .

Even if hearings had been held, the Secretary of State would have been confined to making the factual determination of whether there was probable cause to believe that the person was operating a motor vehicle with .02% by weight of alcohol in his blood. 29 M.R.S.A. §2241-G(2)(B). As the Kennebec County Superior Court has recently held in Williamson v. Secretary of State, Doc. No. CV-83-544, this limitation on the scope of the hearing requires the secretary of State to make a factual determination which is irrelevant to the

issues which should be properly before the agency at the hearing.

The factual issues at the hearing should not be whether the police officer had probable cause at the time he requested the teenager to submit to blood-alcohol testing, but whether the teenager did in fact operate a motor vehicle with .02% by weight of alcohol in his blood. Citing Bell v. Burson, 402 U.S. 525 (1971), Justice Alexander found that this limitation on the scope of the hearing violated Mr. Williamson's rights to due process of law.

Moreover the constitutional claims which Plaintiffs have asserted in the present litigation could not properly have been raised in a hearing before the Secretary of State since that agency is

powerless to rule on them. Therefore, the doctrine of res judicata, or claim preclusion, cannot be applied to these constitutional claims because they could not have been litigated in the administrative proceeding. Beegan v. Schmidt, 451 A.2d 642, 644 (Me. 1982); See Lightsey v. Harding Dahm & Co., 623 F.2d 1219 (7th Cir. 1980).

In this context, one must distinguish between the ability to litigate the constitutional claims in the administrative proceeding from the ability to do so on appeal in the Superior Court pursuant to 29 M.R.S.A. §2242. Only the former is relevant to an inquiry into the applicability of res judicata to the agency's determination; the latter is relevant to an inquiry into the applicability of the doctrine of

"exhaustion of remedies" and will be discussed fully below.

C. The Appellants Did Not Have a Full, Fair, and Adequate Opportunity to Litigate Their Claims

The third prong of the Utah Construction test concerns the adequacy of the adjudicatory proceeding held by the agency. Again assuming, arguendo, that the Secretary of State was acting in an adjudicatory capacity when he imposed the license suspensions, it is apparent that the Plaintiffs were not given an adequate adjudicatory opportunity.

First, neither of the notices of suspension mailed to Plaintiffs complied with 5 M.R.S.A. §9052(4)(c) since they failed to contain "a short and plain

statement of the nature and purpose of the proceeding and of the matters asserted."

Second, as discussed above, the statutory limitation imposed on the scope of the hearing denies due process of law by preventing the litigation of the factual issues which should be resolved at the administrative level.

The administrative hearing must have the requisite indicia of quality, extensiveness, and fairness to merit collateral effect. Griffen v. Big Spring Independent School District, 706 F.2d 645 (5th Cir. 1983). Clearly the notice and opportunity for hearing provided in this case do not satisfy this test.

II. APPELLANTS WERE NOT REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES BEFORE INSTITUTING THE PRESENT ACTION

. . . .

Appellants herein squarely challenge the very heart of the suspension procedure established under 29 M.R.S.A. §2241-G. This statute denies due process in the hearing process in several respects. First, the initial suspension imposed without preliminary hearing is not justified by the public interest, which interest is outweighed by the private interest persons under 20 have in retaining their licenses. Unlike the license suspension imposed without preliminary hearing in Mackey v. Montrym, 443 U.S. 1 (1979) for a refusal to take a blood-alcohol test, the license

suspensions imposed under the Teen Drinking law bear no rational relationship to highway safety since there is no scientific evidence linking the statutory standard of .02% w/v alcohol to the impaired ability to drive. Moreover, like the suspension imposed in the Barchi case, a suspended teenager is not guaranteed a hearing within a specified time and cannot obtain a stay for any reason pending the hearing. §2241-G(2) (29 M.R.S.A. 2241(3) does provide that hearings will be held "without 'undue' delay.")

Second, as discussed above, the hearing which is provided by P.L. 1983, c.478 is unconstitutionally limited to the factual issue of whether the police officer had probable cause to demand that

the teenager submit to a blood-alcohol test.

. . . .

E. OPINION OF THE MAINE SUPREME JUDICIAL COURT

MAINES, et al. vs. SECRETARY OF STATE

Decision No. 3817

Plaintiffs argue somewhat circuitously that (1) the statutory limitation imposed upon the scope of the administrative hearing denies due process and (2) that the nature of their facial attack upon the constitutionality of the statute excuses their failure to exhaust administrative remedies. Even on appeal the plaintiffs have not suggested any prejudice resulting to them from perceived limitations upon a hearing they

did not request. Contrariwise, they assert with some vigor that an administrative determination of the facts would have no impact upon the gravamen of their complaint.[2]

. . . .

---

[2] In Boston Milk Producers, Inc. v. Halperin, 466 A.2d 33, 36 (Me. 1982), we intimated that constitutional issues may be decided in an action for declaratory judgment if there is no necessity for a determination of facts by an administrative agency. We sidestepped, however, any review of procedures that could be called adjudicatory thus avoiding any res judicata problem.

Supreme Court, U.S.
FILED
OCT 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-387

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WILLIAM K. MAINES and PETER K. GUTHRIE,
Petitioners

v.

SECRETARY OF STATE,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT OF MAINE

BRIEF OF RESPONDENT

Attorneys for Respondent:

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Statement of the Case

This case began as a challenge to 29 M.R.S.A. § 2241-G (2)(B) (Supp. 1983), enacted by P.L. 1983, ch. 478 (the "Teen Drinking Act"), which authorizes the Secretary of State of Maine to suspend the provisional licenses of persons under twenty years old for a period of one year where the person is found to have been operating or attempting to operate a motor vehicle while having 0.02% or more by weight of alcohol in his blood as measured by an approved testing procedure.

The driver's licenses of Petitioners Guthrie and Maines, who at the time were under 20 years of age, were suspended for one year on August 12, 1983 and August 30, 1983, respectively, pursuant to the terms of the Teen Drinking Act. Neither Petitioner took advantage of the opportunity for administrative and judicial review of their suspensions as provided by the Teen Drinking Act, 29 M.R.S.A. § 2241(3) (Supp. 1984) and 29 M.R.S.A. § 2242 (Supp. 1984). Instead, they waited until after the passage of the statutory time limits for direct appeal and then filed on October 6, 1983, a class action pursuant to 42 U.S.C. § 1983 challenging the constitutionality of the Teen Drinking Act, principally on the grounds that the statutory limitation on the right of suspended drivers to challenge all the elements of the offense causing suspension in the administrative appeal provided by the Teen Drinking Act violates the Due Process Clause of the Maine and United States Constitutions.[1] The Class Action Complaint sought declarative and injunctive relief requiring the Secretary of State to restore all driving privileges suspended, to return all license certifications surrendered, to expunge all records pertaining to suspensions under the Act and to cease and desist from implementing the Act.

Petitioner's Class Action Complaint, as amended, was dismissed by the Maine Supreme Court and that dismissal was affirmed by the Maine Supreme Judicial Court for the reason

[1]Petitioners also challenged the Act under the Equal Protection and Bill of Attainder clauses of the Maine and United States Constitutions.

that Petitioners' failure to appeal their license suspensions resulted in claim preclusion with respect to their subsequent § 1983 action. *Maines v. Secretary of State,* 493 A.2d 326 (Me. 1985).

Prior to the filing of the Petition in the Court, the driving privileges of both Petitioners were fully restored without restriction or condition (*see* Appendix A herein) and the Teen Drinking Act was repealed and replaced with a new act, 29 M.R.S.A. §§ 2241-G(2)(G) through 2241-G(2)(0) (Appendix B), which *inter alia* removes the limitations at the administrative appeal level that formed the principal basis of Petitioners' Class Action Complaint.[2]

Reasons for Denying the Writ

I. PETITIONERS' CLAIMS ARE MOOT.

This Petition should be denied as moot, if as a result of intervening events (1) there is no reasonable expectation that the alleged violation will recur and (2) interim events have eradicated the effects of the alleged violation. *County of Los Angeles v. Davis,* 440 U.S. 625, 631 (1979).

Here, the principal focus of Petitioners' case, as in the State courts below, is the claim that the administrative hearing provided by the Teen Drinking Act to appeal a suspension order does not allow the suspended driver to challenge all the elements of the offense leading to the suspension and this limitation violates Due Process. *See, e.g.,* Petition at 25-32. Even before the Petition was filed, however, this claim became moot because the statutory provision challenged by Petitioners was repealed by P.L. 1983, ch. 850, § 4 and substituted with a provision that allows suspended drivers to challenge all the

[2]Also, effective July 1, 1985, and in conjunction with establishment of 21 years as the minimum age for purchasing intoxicating alcohol in Maine, P.L. 1985, ch. 402 § 9 further amended § 2241-G(2) by, *inter alia,* replacing references to persons not having attained their 20th birthday with references to persons not having attained their 21st birthday.

elements of the offense causing the suspension. 20 M.R.S.A. § 2241-G(2)(K) (Supp. 1984) (*See* Appendix B). Since the relief sought judicially by Petitioners has been supplied legislatively, the heart of Petitioners' case is gone. *Princeton v. Schmid,* 455 U.S. 100 (1982) (substantial amendment of challenged University regulations prior to Supreme Court review of State Court judgment regarding the regulations' constitutionality made case moot); *United States v. Alaska S.S. Co.,* 253 U.S. 113 (1920) (pending appeal, Congress passed new law which makes the original case moot).

Not only has the source of Petitioners' principal claim been eliminated, but there are no continuing effects of the alleged illegality because Petitioners' licenses have been fully restored, *see,* Storer Affidavit (Appendix A),[3] and Maine law does not enhance other civil or criminal sanctions because of a violation of the Teen Drinking Act. *See Lane v. Williams,* 455 U.S. 624 (1982) (where complainants failed to demonstrate continuing disability resulting from violation of expired parole term, no live controversy exists regarding habeas corpus claims).

Petitioners subsidiary constitutional claims are likewise moot because there is not a sufficient "immediacy and reality" to the possibility that these Petitioners[4] again will be subjected to

---

[3] Petitioner Maines' driving record does carry 10 demerit points assigned pursuant to regulations adopted under 29 M.R.S.A. § 2241(2) (Supp. 1984) because he operated a motor vehicle while under the suspension challenged here in violation of 29 M.R.S.A. § 2184 (Supp. 1984). *See,* Storer Affidavit (Appendix A). However, this fact does not relieve the case from mootness because Maine law prohibits driving while under suspension even if the underlying suspension was subject to challenge. *See Piacitelli v. Quinn,* 449 A.2d 1126 (Me. 1982).

[4] Petitioners appealed the denial of their Motion for Class Certification in the Superior Court to the Maine Supreme Judicial Court, which never reached the issue in view of its disposition on the merits of the case. No class claim is included in the questions presented here. Even if such a claim were raised here, it would make no difference. Obviously, "if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." *O'Shea v. Littleton,* 414 U.S. 488, 494-5 (1974).

the effects of the new law that replaced the Teen Drinking Act or even that the terms of the new Act are offensive to Petitioners for the same subsidiary reasons raised to challenge the repealed law. *See, Golden v. Zwickler,* 394 U.S. 103 (1969); *O'Shea v. Littleton, supra,* and *City of Los Angeles v. Lyons,* 103 S.Ct. 1660 (1983).[5]

II. EVEN IF THIS CASE IS NOT MOOT, THE PETITION SHOULD BE DENIED.

The sole grounds advanced in support of the Petition in this case is that Petitioners were denied Due Process when the Maine Supreme Judicial Court gave claim preclusive effect to unappealed administrative orders of the Maine Secretary of State suspending their driver's licenses in relation to a subsequent State court challenge to the constitutionality of the Teen Drinking Act pursuant to which the suspensions occurred.

The State has no quarrel with the general principle relied upon by Petitioners, whether expressed in terms of federal common law, *see United States v. Utah Construction & Mining Co.,* 384 U.S. 394, 422 (1966), or Due Process, *see Kremer v. Chemical Construction Corp.,* 456 U.S. 461, 481-3 (1982), that claim preclusion will not apply when a party against whom the earlier judgment is asserted did not have a full and fair opportunity to litigate the issue in the earlier case. However, Petitioners misapply that principle here.

The "issue" that was given claim preclusive effect in this case is *not* whether Petitioners had a full and fair opportunity to challenge the elements of the offense of operating a motor vehicle while having a .02% or more alcohol in their

---

[5]The remoteness of the prospect of future conflict with the new law is further emphasized by the fact that Petitioners are approaching the age of 21, *see* Petitioners' Appendix D, after which they will be entirely beyond the reach of the new act. *See Atherton Mills v. Johnson,* 250 U.S. 13, 15 (1922) ("The lapse of time since the case was heard and decided in the District Court has brought the minor, whose employment was the subject matter of the suit, to an age which is not within the ages affected by the act. The act, even if valid, cannot affect him further").

blood under the Teen Drinking Act, as argued by Petitioners. Rather, the "issue" is whether Petitioners had a full and fair opportunity in the first instance to challenge the facial constitutionality of the Teen Drinking Act on the grounds that this Act contained restrictions on the right to challenge the elements of the suspension offense in violation of Due Process, or on any other grounds asserted in their Amended Verified Class Action Complaint.

There can be no doubt that Petitioners had a full and fair opportunity to raise all the constitutional challenges to the Teen Drinking Act in the first instance when their driver's licenses were suspended. The Teen Drinking Act provided for a post-deprivation hearing for a license suspension before the Secretary of State pursuant to 29 M.R.S.A. § 2241-G(2)(B). It further provided for judicial review of the administrative suspension in the Superior Court pursuant to 29 M.R.S.A. § 2242. This review in Superior Court included the right to challenge the constitutionality of any aspect of the Teen Drinking Act, including restrictions on the right to challenge the elements of the suspension. If Petitioners had requested an administrative hearing, as it was their right to do, and if they had then appealed the suspension to the Superior Court, which was also their right, they could have litigated the constitutionality of the restrictions in the Teen Drinking Act on the right to challenge the elements of the suspension. Petitioners failed to do so, and even as of this date fail to specify what prejudice resulted from the limitations in the administrative hearing that they complain about. As a result the Law Court properly precluded the Petitioners from bringing a subsequent action challenging the Teen Drinking Act.[6]

---

[6]The clearest evidence of Petitioners' opportunity to challenge the constitutionality of the Teen Drinking Act is found in the very opinion which they include as part of their Appendix in their Petition. In the Maine Superior Court decision of *Williamson v. Secretary of State*, Sup.Ct. Civil Action, Docket No. CV-83-544 (Petitioners' Appendix B-34 through B-57), the driving license of Williamson was suspended under the same Teen Drinking Act at issue in this case. Unlike the Petitioners here, Williamson requested an administrative hearing before the Secretary of State as provided by the Teen Drinking Act and objected to the limitations in the Act on the right to challenge the elements of

It is now "hornbook law that the principles of res judicata [or claim preclusion] apply in § 1983 actions." *Griffin v. State of Rhode Island,* 760 F.2d 359, 360 (1st Cir. 1985); *Allen v. McCurry,* 449 U.S. 90 (1980); *Migra v. Warren City School District Board of Education,* 104 S.Ct. 892 (1984). While the issue of whether an unreviewed administrative *decision* denying a § 1983 claimant's rights is entitled to preclusive effect in a subsequent *federal court* challenge is arguably an "open one," *see Gorin v. Osborne,* 756 F.2d 834, 838, n.5 (11th Cir. 1985); *compare Zanghi v. Incorporated Village of Old Brookville,* 752 F.2d 42 (2d Cir. 1985) *with, Elliot v. University of Tennessee,* 766 F.2d 982 (6th Cir. 1985); this is clearly not the case to resolve that general issue. Petitioners did not unsuccessfully litigate their Section 1983 claims before an administrative agency. They forfeited their rights to do so by not requesting a hearing. Nor did Petitioners seek a subsequent federal court forum to vindicate their rights earlier denied by a state administrative agency. Instead, they resorted to the same forum, State court, where they had a full and fair opportunity to vindicate their rights in the first place.

---

the suspension offense. When the suspension order was upheld by the Secretary of State, Williamson appealed to the Superior Court where he challenged the constitutionality of the Teen Drinking Act. The Superior Court agreed with Williamson's arguments, declared the administrative limitations in the Act to be unconstitutional in violation of Due Process, and remanded the case back to the Secretary of State for a full and unlimited administrative hearing pursuant to the terms of the Maine Administrative Code.

Conclusion

For the foregoing reasons, the Petition for a Writ of Certiorari in this case should be denied.

Respectfully submitted,

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October 4, 1985

Appendix A

No. 85-387

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WILLIAM R. MAINES

and

PETER K. GUTHRIE,

Petitioners

v.

SECRETARY OF STATE,

Respondent

Affidavit of George E. Storer,
Deputy Secretary of State of the State of Maine

I, George E. Storer, being first duly sworn, do depose and state as follows:

1. I have personal knowledge of the matters stated in this Affidavit and am competent to testify thereto;

2. I am a Deputy Secretary of State for the State of Maine;

3. In my official capacity as a Deputy Secretary of State, I was responsible for the Department of the Secretary of State's

implementation of P.L. 1983, ch. 478, and I have been responsible for implementation of its successor statutes;

4. In my capacity as Deputy Secretary of State, I administer the Department of the Secretary of State's Division of Driver Licensing and Control, which maintains official State records of the status of Maine persons' privileges to operate motor vehicles, including records of suspensions of the privilege to operate motor vehicles pursuant to P.L. 1983, ch. 478, and its successor statutes;

5. I am familiar with the Department of the Secretary of State's suspensions pursuant to P.L. 1983, ch. 478, of the privileges to operate a motor vehicle of William R. Maines and Peter K. Guthrie, which suspensions are the subject of this appeal, and I have reviewed diligently the Department of the Secretary of State's official records of those suspensions, in making this Affidavit;

6. Effective February 12, 1984, after Peter K. Guthrie had met criteria set forth in 29 M.R.S.A. § 2241-G(2)(D) as enacted by P.L. 1983, ch. 478, the Department of the Secretary of State restored, without restriction or condition, Mr. Guthrie's privilege to operate a motor vehicle, which right had been suspended pursuant to P.L. 1983, ch. 478;

7. Peter K. Guthrie's privilege to operate a motor vehicle in Maine is not now subject to any condition or restriction imposed as a direct consequence of a suspension pursuant to P.L. 1983, ch. 478, or a successor statute;

8. Effective May 16, 1984, after William R. Maines had met criteria set forth in 29 M.R.S.A. § 2241-G(2)(I), the successor provision to 29 M.R.S.A. § 2241-G(2)(D) as enacted by P.L. 1983, ch. 478, the Department of the Secretary of State restored, without restriction or condition, Mr. Maines's privilege to operate a motor vehicle, which had been suspended pursuant to P.L. 1983, ch. 478;

9. William R. Maines's privilege to operate a motor vehicle in Maine is not now subject to any condition or restriction imposed as a direct consequence of a suspension pursuant to P.L. 1983, ch. 478, or a successor statute.

10. Official records of my office indicate that on March 19, 1984 and pursuant to 29 M.R.S.A. § 2241(2) (Supp. 1984),

the Department of the Secretary of State assigned 10 demerit points to Mr. Maines because of his violation of 29 M.R.S.A. § 2184 (Supp. 1984) on September 15, 1983.

Dated: October 3, 1985 _____

GEORGE E. STORER

STATE OF MAINE,
KENNEBEC, ss.

Personally appeared the above-named George E. Storer and made oath that the statements made by him in the foregoing Affidavit are true and correct and are based upon his personal knowledge.

Before me,

Dated: October 3, 1985 _____

Notary Public

My commission expires July 7, 1990

Appendix B

Title 29 M.R.S.A. § 2241-G (Supp. 1984)

§ 2241-G. Provisional license

1. Licensee 20 years of age and older. The original state license issued to a new applicant 20 years of age and older shall be a provisional license for a period of one year following the date of issue and shall remain in force as a nonprovisional license to the next normal expiration date. If a person is convicted of or adjudicated to have committed a motor vehicle moving violation while in possession of a provisional license on the first offense, the license shall be suspended for 30 days. If he is convicted of or adjudicated to have committed a 2nd moving violation, his license shall be suspended for 60 days and if he is convicted of or adjudicated to have committed a 3rd moving violation, the license shall be suspended to the 2nd birthday next following the date of issue or for 90 days, whichever shall be the longer period of time. In these cases, a hearing may be requested of the Secretary of State, and the Secretary of State shall afford the provisional licensee opportunity for hearing as soon as practicable after receipt of the request. Upon the hearing, the Secretary of State, for good cause shown, may continue, modify or rescind the suspension. This subsection shall not prevail when a person is convicted of or adjudicated to have committed an offense which carries a suspension or revocation period greater than that prescribed in this subsection.

2. Licensee under 20 years of age. The original license or any renewal license issued to an applicant under 20 years of age shall be a provisional license for a period of one year following the date of issue or until the licensee attains the age of 20 years of age, whichever occurs last. Upon expiration of the provisionary term, the license shall remain in force as a nonprovisional license to the next normal expiration date. Any license issued by any other jurisdiction to a person who has not yet attained the age of 20 years shall be construed to be

a provisional license for the purpose of operating a motor vehicle within this State.

A. During the first year from the date of issue of the provisional license, if a person is convicted of or adjudicated to have committed a motor vehicle moving violation, on the first offense, the license shall be suspended for 30 days. If he is convicted of or adjudicated to have committed a 2nd moving violation, his license shall be suspended for 60 days and if he is convicted of or adjudicated to have committed a 3rd moving violation, the license shall be suspended to the 2nd birthday next following the date of issue or for 90 days, whichever shall be the longer period of time. In these cases, a hearing may be requested of the Secretary of State, and the Secretary of State shall afford the provisional licensee opportunity for hearing as soon as practicable after receipt of the request. Upon the hearing, the Secretary of State, for good cause shown, may continue, modify or rescind the suspension. This paragraph shall not prevail when a person is convicted of or adjudicated to have committed an offense which carries a suspension or revocation period greater than that prescribed in this paragraph.

B. Except where a longer period of suspension is otherwise provided by law, the Secretary of State shall suspend for a period of one year, without preliminary hearing, the provisional license of any person who has not attained his 20th birthday:

(1) As to whom there is received a record of conviction or adjudication for violation of section 1312-B or 1312-C or Title 15, section 3103, subsection 1, paragraph F; or

(2) As to whom he determines has operated or attempted to operate a motor vehicle while having 0.02% or more by weight of alcohol in his blood.

C. Any person not having attained his 20th birthday who operates or attempts to operate a motor vehicle within this State shall have the duty to submit to a test to determine his blood-alcohol level by analysis of his blood or breath,

if there is probable cause to believe he has operated or attempted to operate a motor vehicle while having 0.02% or more by weight of alcohol in his blood. The provisions of section 1312 shall apply, except that in all cases probable cause shall be to believe that the person was operating or attempting to operate a motor vehicle while having 0.02% or more by weight of alcohol in his blood and that the person had not attained his 20th birthday, and except that suspension for failing to comply with the duty to submit to the test shall be for a period of one year.

D. The Secretary of State shall make the determination of suspension as follows:

(1) The Secretary of State shall suspend the provisional license of any person who has not attained his 20th birthday, and the right to apply for or obtain a license of any such person upon his determination that the person operated or attempted to operate a motor vehicle with 0.02% or more by weight of alcohol in the blood. The suspension shall be for a period of one year and shall continue until satisfaction of any conditions imposed pursuant to paragraph I or O.

(2) The Secretary of State shall make a determination on the basis of the information required in paragraph E and this determination shall be final unless a hearing is requested and held. If a hearing is held, the Secretary of State shall review the matter and make a final determination on the basis of evidence received at the hearing.

(3) The determination of these facts by the Secretary of State is independent of the determination of the same or similar facts in the adjudication of any civil or criminal charges arising out of the same occurrence. The disposition of those civil or criminal charges shall not affect any suspension under this section. Statements made by the licensee at the hearing before the Secretary of State shall not be introduced by the State in its case in chief in any prosecution for violation of section 1312-B, 1312-C or Title 15, section 3103, subsection 1, paragraph F, arising out of the same occurrence.

E. A law enforcement officer shall forward a report to the Secretary of State as follows.

(1) A law enforcement officer who had probable cause to believe any person who had not attained his 20th birthday was operating or attempting to operate a motor vehicle with 0.02% or more by weight of alcohol in the blood shall immediately forward to the Secretary of State a report, under oath of all information relevant to the enforcement action, including information which adequately identifies the person, a statement of the officer's grounds for belief that the person committed the offense of operating or attempting to operate a motor vehicle while having 0.02% or more by weight of alcohol in the blood, and a certificate under section 1312, subsection 8, of the result of any blood-alcohol test by a self-contained breath-alcohol testing apparatus which was conducted and which shows the presence of 0.02% or more by weight of alcohol in the blood.

(2) The report required in this subsection shall be made on forms supplied by or approved by the Secretary of State.

(3) If the blood-alcohol test was not analyzed by a law enforcement officer, the person who analyzed the results shall cause a copy of his certificate under section 1312, subsection 8, to be sent to the Secretary of State.

F. The notice of suspension by the Secretary of State shall be made as follows.

(1) Upon receipt of the information required in paragraph E, the Secretary of State shall make the determination described in paragraph D. If the Secretary of State determines that the person is subject to license suspension, he shall immediately issue a notice of suspension.

(2) The notice of suspension shall be sent by regular mail to the person at the last known address on record at the Division of Motor Vehicles, or to the address provided in the report of the law enforcement officer if that address differs from the address of record.

(3) The notice of suspension shall clearly specify the reason and statutory grounds for the suspension, the effective date of the suspension, the right of the person to request a hearing, the procedure for requesting a hearing and the date by which that request for a hearing shall be made. The notice of suspension shall also clearly state that a copy of the report of the law enforcement officer under paragraph E, subparagraph (1), and a copy of the blood-alcohol test certificate under paragraph E, subparagraph (1) or (3), will be provided to the person upon request to the Secretary of State.

G. Effective date and period of suspension.

(1) Any suspension imposed shall be effective on a specified date not less than 10 days after the mailing of the notification of suspension by the Secretary of State. If a person whose license is suspended desires to have a hearing, he shall so notify the Secretary of State, in writing, within 10 days from the effective date of the suspension. The suspension shall be stayed for 10 days from the effective date of the suspension. If, within 10 days from the effective date of the suspension, the Secretary of State is notified, in writing, of a request for a hearing, the suspension shall be stayed until a hearing is held and a decision is issued. The Secretary of State shall conduct a hearing and issue a decision within 80 days from the date of receipt of a written request for hearing. Failure by the Secretary of State to conduct a hearing and issue a decision within the 30-day period shall result in an extension of the stay of the Secretary of State's suspension order until such time as a hearing is conducted and a decision issued. Notwithstanding this subsection, there shall be no stay of suspension during the period of any delay of hearing which is caused or requested by the petitioner.

(2) When a person's license is suspended under this section and is also suspended after having been adjudicated or convicted on charges arising out of the same occurrence for a violation of section 1312-B or 1312-C or Title

15, section 3103, subsection 1, paragraph F, the period of time his license has been suspended under this section prior to the adjudication or conviction shall be deducted from the period of time of any court-imposed suspension ordered pursuant to section 1312-B or 1312-C or Title 15, section 3103, subsection 1, paragraph F.

H. Upon receipt by the Secretary of State of a petition for a work-restricted license by any person whose license or right to operate a motor vehicle has been suspended pursuant to paragraph B, subparagraph (2), the Secretary of State may state the suspension during the statutory period and issue a work-restricted license. The issuance of such a license shall be conditioned upon a showing by the petitioner by clear and convincing evidence that such a license is necessary to operate a motor vehicle between the residence and a place of employment or to operate a motor vehicle in the scope of employment, or both, as determined by the Secretary of State and that no alternative means of transportation is available.

I. Following expiration of ½ of the total period of suspension imposed pursuant to paragraph B, the Secretary of State may issue a provisional license, subject to the conditions, restrictions or terms he deems advisable, to the person if the Secretary of State receives written notice that the person has satisfactorily completed the alcohol educational program of the Department of Human Services and, when required, has satisfactorily completed an alcohol treatment or rehabilitation program approved or licensed by the department.

J. A person who has received notice of suspension may request a hearing as follows.

(1) Any person who has received a notice of suspension under this section may make a written request for a review of the determination of the Secretary of State at a hearing.

(2) The request for hearing shall be made within 10 days from the effective date of the suspension. If a written

request for a hearing is made after such date and the Secretary of State finds that the person was unable to make a timely request due to lack of actual notice of the suspension or due to factors of physical incapacity, the Secretary of State shall waive the period of limitation, reopen the matter and grant the hearing request, except, in such a case, a stay of suspension pending the hearing shall not be granted.

K. The hearing and notice shall be as follows.

(1) The hearing and notice shall be as provided in section 2241, subsection 3.

(2) The scope of the hearing shall include whether, by a preponderance of the evidence:

(a) There was probable cause to believe that the person had not attained his 20th birthday and that the person was operating or attempting to operate a motor vehicle while having 0.02% or more by weight of alcohol in his blood;

(b) The person operated or attempted to operate a motor vehicle;

(c) At such time the person had 0.02% or more by weight of alcohol in his blood; and

(d) At such time the person had not attained his 20th birthday.

(3) A certificate duly signed and sworn to pursuant to section 1312, subsection 8, shall be prima facie proof of facts stated therein and that the person taking a specimen of blood or breath was authorized by section 1312, subsection 6, that the equipment, chemicals and other materials used in the taking of the blood specimen or a breath sample were of a quality appropriate for the purpose of producing reliable test results, that any equipment, chemicals or materials required by section 1312, subsection 6, to be approved by the Department of Human Services were in fact approved, that the sample tested by the person certified under section 1312, subsection 6, was in fact the same sample taken and that the percentage by weight of alcohol in the blood was, at the

time the blood or breath sample was taken, as stated in the certificate.

(4) If it is determined after hearing that there was not the requisite probable cause for blood-alcohol test administration or that the person had attained his 20th birthday at the time of operation or attempted operation or that the person did not operate or attempt to operate a motor vehicle while having 0.02% or more by weight of alcohol in his blood, the suspension shall be removed immediately and the Secretary of State shall delete any record of the suspension.

(5) Any person whose license is suspended under this section on the basis of a blood-alcohol test may, within 30 days after receipt of the decision, appeal to the Superior Court for judicial review as provided in Title 5, sections 11001 to 11008. If the court rescinds the suspension it shall also order the Secretary of State to delete any record of the suspension.

L. Any suspension pursuant to this section or license reissued after suspension pursuant to paragraph I may extend beyond the person's 20th birthday to allow for completion of the total suspension period or to continue the period of condition, restriction or term imposed on a license reissued pursuant to paragraph I.

M. The Secretary of State may promulgate whatever rules are necessary to carry out the purposes of this section.

N. In the event that a person who has not attained his 20th birthday is determined to have operated or attempted to operate a motor vehicle while having 0.10% or more of alcohol in the blood such that both this subsection and section 1311-A apply, this section shall govern to the exclusion of section 1311-A.

O. Following the expiration of the total period of suspension imposed pursuant to paragraph B, the Secretary of State may issue a provisional license, subject to the condi-

tions, restrictions or terms he deems advisable, to the person if the Secretary of State has received or when he receives written notice that the person has satisfactorily completed the alcohol educational program of the Department of Human Services and, when required, has satisfactorily completed an alcohol treatment or rehabilitation program approved or licensed by the department.

Title 29 M.R.S.A. § 2242 (Supp. 1984)

§ 2242. Appeals

After hearing, as provided in section 2241, subsection 3, any person who is aggrieved by the decision of the Secretary of State or his deputy in suspending or revoking a license, permit or right to operate a motor vehicle, a certificate of registration or a certificate of title, or by the failure or refusal of the Secretary of State or his deputy to issue a license, permit or right to operate a motor vehicle, a certificate of registration or a certificate of title may, within 30 days thereafter, appeal to the Superior Court for a judicial review as provided in Title 5, section 11001, et seq.

Title 29 M.R.S.A. § 2241 (3) (Supp. 1984)

3. Hearing. Upon suspending or revoking a motor vehicle license, permit or privilege to operate, registration or certificate of title of any person without preliminary hearing, the Secretary of State shall notify that person as provided in Title 5, section 9052, subsection 1, that an opportunity for hearing shall be provided without undue delay, after receipt of a request, except where the suspension rests solely upon a conviction in court of any offense which by statute is expressly made grounds for that suspension or revocation.

If a hearing is held to determine whether a person's motor vehicle operator's license, permit or privilege to operate,

registration or certificate of title should be restored, the hearing shall be conducted as provided in Title 5, chapter 375, subchapter IV.[6] Upon the hearing, the Secretary of State shall either rescind his order of suspension or, for good cause, may continue, modify or extend the suspension of the license, permit or privilege to operate, registration or certificate of title.

Notice shall be given as provided in section 54. The date of birth and name on the notification of suspension or revocation document shall be prima facie evidence that the named person is the same person as the defendant of the same name and birthday.

Any person who, after notice of suspension or revocation, fails or refuses to obey any order of the Secretary of State under this section or fails or refuses to surrender to the Secretary of State upon demand any motor vehicle license, permit, registration or certificate of title, issued in this State or any other state which has been suspended, canceled or revoked by proper authority in this State or any other state, as provided by law shall be guilty of a Class E crime.

Supreme Court, U.S.
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NO. 85-387

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WILLIAM R. MAINES

AND

PETER K. GUTHRIE,

Petitioners

v.

SECRETARY OF STATE,

Respondent

REPLY BRIEF

OF THE

PETITIONERS

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PETITIONERS' REPLY TO NEW MATTER

I. PETITIONERS' CLAIMS ARE NOT MOOT.

A. Petitioners' Claims for Relief Are Not Fully Satisfied.

Respondent's opposing brief ignores three elements of relief prayed for by Petitioners in their Amended Verified Class Action Complaint which remain unsatisfied to this date and which continue to provide them with a personal stake in the outcome of this case on the merits.[1]

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[1] Petitioners concede that the denial of their motion for class certification, however erroneous, and the Maine Supreme Court's failure to act upon Petitioners' appeal from that denial, however conflicting with this Court's precedents, e.g., United States Parole Commission v. Geraghty, 445 U.S. 388 (1980), do not raise federal questions of law since they involve the interpretation of Rule 23 of the Maine Rules of Civil Procedure and the standing requirements of Maine law.

First, Petitioners sought an injunction requiring the restoration of their licenses and rights to operate, without the payment of any reinstatement fee. While it is true that Petitioners' licenses were restored on May 16, 1984 and February 12, 1984 respectively,[2] it is also true that each of them were required to pay to Respondent $20.00 in reinstatement fees in order to obtain said restorations.[3] Payment of these fees were required by 29 M.R.S.A. §2241-D(1) and have given rise to a claim for damages against Respondent not possessed by Petitioners at the time they filed

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2 Respondent's failure to notify the Maine Supreme Judicial Court of these restorations at oral argument on June 7, 1984, while not a waiver of the mootness question, can only be interpreted as an indication that he then believed the case to be otherwise "live".

3 See Appendix B of the Petition for Writ of Certiorari, pp. B-27 and B-32, for the requirement of a reinstatement fee in the Notices of Suspension mailed to Petitioners.

their action in 1983. Given that this claim for damages must be pursued in state court,[4] it would be an exercise in utter futility to require Petitioners to refile their suit as a damage action, only to be again confronted with the Maine Supreme Court's application of res judicata to bar their action.

Second, Petitioners sought the expungement of their records maintained by Respondent pertaining to their Teen Drinking Act suspensions. Pursuant to Maine Law, Petitioners have a right to such expungement where it is determined that the original suspension was illegal. 29 M.R.S.A. §§2241-G(K)(4), (5).[5]

This provision of Maine law reflects the Legislature's determination that a

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[4] Pennhurst State School and Hospital v. Halderman, ____ U.S. ____, 52 U.S.L.W. 4155 (1984).

[5] Respondent's Appendix B, p. 18; Petitioners' Appendix C, p. C-11.

person's motor vehicle driving record has important collateral consequences for e.g., the cost of insurance, albeit that such non-statutory consequences may not in themselves be legally sufficient to keep alive an otherwise moot case. See, e.g., Lane v. Williams, 455 U.S. 624 (1982).

Third, Petitioners have sought their costs of suit, including a reasonable attorney's fee pursuant to 42 U.S.C. §1988. Insofar as an award of fees under §1988 depends upon a judicial determination that Petitioners are the prevailing parties in the litigation, they have a sufficient personal stake in obtaining a ruling on the merits of the litigation. Cf., Deposit Guaranty Nat. Bank v. Roper, 445 U.S. 326, 336, 346 n.2 (Powell, J. dissenting) (1980).

B. Petitioners' Grounds For Relief Have Not Been Fully Cured By The Legislature.

While it is true that the Maine Legislature has cured several due process deficiencies in the original Teen Drinking Act through the enactment of P.L.1983, c. 850, there remain several grounds for relief in Petitioners' Amended Complaint which will give rise to prospective declaratory and injunctive relief:

(1) Petitioners allege in Count Two of said Complaint that the Teen Drinking Act deprives them of equal protection of the laws under the 14th Amendment to the U.S. Constitution and Article I, Section 6-A of the Maine Constitution in that said Act invidiously discriminates against persons under twenty years of age

and is not rationally related to a legitimate state interest.

P.L.1983, c. 850 did nothing to moot this ground for relief. Indeed, the class discriminated against now consists of those persons under twenty-one years of age with blood-alcohol levels of .02% or more, a level which bears no scientific correlation at all with highway safety.

(2) Count Six of the Complaint challenges the state's right to provide them with a post-suspension hearing as opposed to a pre-suspension hearing, in that the blood-alcohol level of .02% does not justify the more expedient procedure. Current Maine law still provides for a post-suspension hearing for those subject to the Teen Drinking Act. 29 M.R.S.A. §2241-G(2)(B).

II. THE ADMINISTRATIVE ORDER IS NOT ENTITLED TO RES JUDICATA EFFECT.

Respondent's argument at pp. 4-6 of his opposing brief is a creative attempt to provide a rationale for the Law Court's decision in this case. Certainly it is apparent that the Law Court itself did not use the analysis put forth by the Respondent, particularly his emphasis upon the Petitioners' ability to have their constitutional claims heard in the Superior Court on appeal from the administrative determination.

Even if the Law Court had relied upon Respondent's analysis, the application of res judicata to the administrative order in this case would have offended principles of due process.

Respondent ignores the plain meaning of former §2241-G(2)(B) that the

administrative hearing was limited in scope solely to the issue of the arresting officer's probable cause. No other issues, factual or legal, were properly before the agency.

Thus, Petitioners would have been barred at the agency hearing from developing the facts necessary to support their equal protection argument, e.g., that the Teen Drinking Act is not rationally related to any legitimate governmental objective, and that there is no scientific evidence supporting the establishment of .02% as a blood-alcohol level related to highway safety.

Moreover, none of Petitioners' legal challenges to the Act were cognizable at the agency level.

Also, respondent's reliance upon the hearing which Petitioners could have had in the Superior Court on appeal from an

administrative hearing order, ignores the limitations placed upon the scope of review at such a judicial hearing.

Such hearings are not de novo; indeed, the reviewing court "... shall not substitute its judgment for that of the agency on questions of fact." 5 M.R.S.A. §11007(3).

Thus, the Superior Court would also be bound by the statutory limits on the scope of the factual issues.

Furthermore, Respondent's insistance that Petitioners were required to resort to the Superior Court on appeal to resolve their legal challenges,[6] rather than through this §1983 action, simply confuses the doctrine of res judicata with that of exhaustion of remedies and would result in a bar to any collateral

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[6] Respondent concedes that the agency had no power to adjudicate Petitioners' legal challenges.

attack on an agency decision, however deficient. In Maine, it is not necessary to appeal administrative action before filing a direct challenge to the constitutionality of a statute, where agency fact-finding is not appropriate. Boston Milk Producers, Inc. v. Halperin, 446 A.2d 33, 36 (Me. 1982).

CONCLUSION

For the foregoing reasons, Petitioners renew their request for the granting of a Writ of Certiorari.

Date: ~~October~~ 18, 1985.

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APPENDIX A

I. 5 M.R.S.A. §11007(3)

§ 11007. Manner and Scope of Review

. . . .

3. Judgment. The court shall not substitute its judgment for that of the agency on questions of fact.

. . . .

II. 29 M.R.S.A. §2241(D)

§2241(D). Reinstatement Fee

1. Fee. Notwithstanding any other provisions of this Title, before a mandatory suspension, a mandatory revocation or a suspension ordered by the Secretary of State of a person's driving privilege may be terminated or

reinstated, there shall be paid to the Secretary of State a fee of $25.00 which shall be in addition to the regular registration or license fee.

2. Application. This section shall not apply to any suspension or revocation that is set aside by the Secretary of State or a court.